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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES D. RICKETTS, et al.,

Petitioners,

v.

TRACY RAY VAUGHAN, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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102P.

QUESTION PRESENTED*/

Whether the Director of the Arizona Department of Corrections and other prison officials are entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), for ordering or conducting a series of body cavity searches on male inmates of the maximum security unit at the Arizona State Prison on the 15th, 22nd, and 23rd days of March, 1984 in response to what the Director perceived to be a life-threatening situation at the prison?

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*/ In addition to the parties set forth in the caption, the following are parties to this action:

1. *Plaintiffs*: Gary W. Bernard, Stephen A. Boyes, Eddie Cano, Ray Fell Chatman, Raymond L. Clevidence, Alex Contreras, William Cunningham, Paul Eppinger, Larry Howard, Mark Koch, Frank Kozelou, Bruce Lowry, John Malone, Chester Marks, Mario David Marquez, Donald K. Nelson, Mark Osborne, Frank Palmer, Charles W. Shepherd, Richard L. Sisk, Alfonso Ray Sisneros, Felipe Trevino, and Ruben Zaragoza.

QUESTION PRESENTED*/ - Continued

2. *Defendants*: Lloyd Bramlett, Donald Wawrzaszek, Alfred Grijalva, Herbert Padilla, James Daniel Morgan, Nolan Thompson, Aubrey McLeod, Joseph Scalzo, Marvin Perry, T. Beatty, Lee Holiday, Ted Jolly, John Doe Ohms, John Doe Brahey, John Doe Hercules, Ernie Salazar, Dr. Robert Cassidy, Robert Goldsmith, Grady Allen DeCell, Dr. DeGavyeou, Thomas Scott, Jan Froebe, Joseph Savalas, Dr. Walton DeCarvalho, Ray Wheeling, T. Anderson, Michael LaRue, Steve Cordova, Jimmy Williams, Nolan Morrow, CSO Bowman, and Dr. Patricia Stapler.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTION AND STATUTES 3

STATEMENT OF THE CASE 4

THE QUESTION PRESENTED IS SUBSTANTIAL 8

Petitioners' acts in ordering or performing body cavity searches of the male inmates of the maximum security unit of the state prison in response to what the Director perceived to be a life-threatening situation did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

CONCLUSION 50

APPENDICES

TABLE OF AUTHORITIES

CASES Page

Anderson v. Creighton,
____ U.S. ____,
107 S.Ct. 3034 (1987) 27, 39

Augustine v. Doe,
740 F.2d 322 (5th Cir. 1984). . 44, 45

Baker v. McCollan,
443 U.S. 137 (1979) 9

Bell v. Wolfish,
441 U.S. 520
(1979) 5, 11, 12, 14, 18, 30

Birkenholz v. Sluyter,
857 F.2d 1214 (8th Cir. 1988) . . . 44

Block v. Rutherford,
468 U.S. 576 (1984) 12, 16, 19

Butz v. Economou,
438 U.S. 478 (1978) 22

City of Columbus v. Leonard,
443 U.S. 905 (1979) 49

City of Oklahoma City v. Tuttle,
471 U.S. 808 (1985) 34

Cruz v. Beto,
405 U.S. 319 (1972) 9

TABLE OF AUTHORITIES - Continued

Page

Daniels v. Williams,
____ U.S. ____,
106 S.Ct. 666 (1986) 47

Davis v. Scherer,
____ U.S. ____,
104 S.Ct. 3012 (1984) 5

Estelle v. Gamble,
429 U.S. 97 (1976) 10, 37

Gaut v. Sunn,
792 F.2d 874 (9th Cir. 1986) . 40, 43

Harlow v. Fitzgerald,
457 U.S. 800 (1982) . . . 5, 7, 8, 21

Hewitt v. Helms,
459 U.S. 460 (1983) 12

Hudson v. Palmer,
468 U.S. 517 (1984) 12, 16, 32

Johnson v. Avery,
393 U.S. 483 (1969) 9

Johnson v. Glick,
481 F.2d 1028 (2d Cir.), *cert. denied* 441 U.S. 1033 (1973) . . . 42

TABLE OF AUTHORITIES - Continued

Page

Jones v. North Carolina Prisoners' Labor Union, Inc.,
433 U.S. 119 (1977) 12

Lanza v. New York,
370 U.S. 139 (1962) 31

Lee v. Washington,
390 U.S. 333 (1968) 9

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 44

Malley v. Briggs,
475 U.S. 335 (1986) 26

Mann v. City of Tucson
782 F.2d 790 (9th Cir. 1986) . 43, 44

McRorie v. Shimoda,
795 F.2d 780 (9th Cir. 1986) . . . 41

Meredith v. Arizona,
523 F.2d 481 (9th Cir. 1975) . . . 40

Mitchell v. Forsyth,
472 U.S. 511 (1985) 1, 24, 26

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) . . . 34

TABLE OF AUTHORITIES - Continued

Page

Monroe v. Pape
365 U.S. 167 (1961) 48

Olim v. Wakinekona,
461 U.S. 238 (1983) 12

O'Lone v. Estate of Shabazz,
____ U.S. ____,
107 S.Ct. 2400 (1987) 13, 19

Parratt v. Taylor,
451 U.S. 527 (1981) 6, 9, 43

Pell v. Procunier,
417 U.S. 817 (1974) 10, 13

Price v. Johnston,
334 U.S. 266 (1948) 12

Procunier v. Navarette,
434 U.S. 555 (1978) 21, 22, 23

Rhodes v. Chapman,
452 U.S. 337 (1981) 16, 18

Robb v. Connolly,
111 U.S. 624 (1884) 47

Rutledge v. Board of Regents,
660 F.2d 1345 (9th Cir. 1981) . . . 41

TABLE OF AUTHORITIES - Continued

Page

Sampley v. Ruettgers
704 F.2d 491 (10th Cir. 1983) . . . 38

Stroud v. United States,
251 U.S. 15 (1919) 31

Turner v. Safley, ____ U.S. ____,
107 S.Ct. 2254 (1987) 10, 20

Vaughan v. Ricketts,
859 F.2d 736 (9th Cir. 1988) . . . 34

Vaughn v. Ricketts,
663 F.Supp. 401 (D. Ariz. 1987) . . 39

Whitley v. Albers, 475 U.S. ____,
106 S.Ct. 1078 (1986) 10, 18, 36

Wilson v. Beebe,
770 F.2d 578 (6th Cir. 1985) . . . 44

Wolff v. McDonnell,
418 U.S. 539 (1974) 10, 11

Wood v. Ostrander,
851 F.2d 1212 (9th Cir. 1988) . . . 44

Wood v. Strickland,
420 U.S. 308 (1975) 23

TABLE OF AUTHORITIES - Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 . . . . . 4, 8, 42

MISCELLANEOUS

Brennan, William J., Jr. "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights." 61 *N.Y. Univ. L. Rev.* 535 (1986). . 48

Brennan, William J., Jr., "State Constitutions and the Protection of Individual Rights." 90 *Harv. L. Rev.* 489 (1977). . . . 48

Levin and Colliers, "Containing the Cost of Litigation," 37 *Rutgers L. Rev.* 219 (1985) . . . 43

IN THE SUPREME COURT OF THE UNITED STATES
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JAMES D. RICKETTS, et al.,

Petitioners,

v.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, Dr. James G. Ricketts, former Director of the Arizona Department of Corrections, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in the above-entitled proceedings on October 14, 1988.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App. A), filed October 14, 1988, is reported at 859 F.2d 736, and the district court's decision (App. B) is reported at 663 F.Supp. 401.

JURISDICTION

Petitioners perfected a timely appeal of the district court's denial of their motion for summary judgment based upon qualified immunity pursuant to this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The judgment of the court of appeals affirming the decision of the district court was entered on October 14, 1988. This petition was filed within ninety days from the entry of that decision. The Court has jurisdiction under *28 U.S.C. § 1254(1)*.

CONSTITUTION AND STATUTES

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code provides:

> - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Prison administrators are in a quandary. They are charged with the responsibility of maintaining the security

of their institutions and with insuring the safety of all inmates and correctional personnel. This Court has indicated that prison administrators are to be accorded "wide-ranging deference" in carrying out these responsibilities. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). In addition, this Court has indicated that immunity is available to shield them from liability even when they violate constitutional rights, provided that the constitutional rights violated were not "clearly established" at the time. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Davis v. Scherer*, ____ U.S. _____, 104 S.Ct. 3012 (1984). However, this Court has failed to clearly define what protection, if any, is available under the Fourth or Fourteenth Amendments to prisoners confined in the maximum security unit of a state prison. This case presents the Court with an

opportunity to define the Fourth and Fourteenth Amendment rights of maximum security prisoners on the issue of body cavity searches. The case also provides an opportunity to clarify the role of *Parratt v. Taylor*, 451 U.S. 527 (1981), with respect to substantive constitutional violations.

The respondents in this case are male prisoners of the maximum security unit of the Arizona State Prison at Florence, Arizona who were subjected to body cavity searches on the 15th, 22nd, and 23rd days of March, 1984. The sole motivation for the searches was a genuine concern for the life and safety of inmates and staff at the Arizona State Prison.

Subsequent to the searches, prisoners began filing complaints in the United States District Court for the District of Arizona challenging the searches on a variety of constitutional

theories. The complaints alleged violations of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as various principles of state tort law. The individual complaints were consolidated, attorneys were appointed for the prisoners, and amended complaints were filed. After allowing counsel for respondents the opportunity to complete substantial discovery, counsel for petitioners filed a motion for summary judgment on the ground that petitioners were shielded from liability in this case by the doctrine of qualified immunity as refined by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). After briefs were filed and the issue submitted, the district court issued its order denying the motion. An appeal was taken to the Ninth Circuit, and a panel of that court affirmed the order of the district

court in an opinion issued October 14, 1988.

THE QUESTION PRESENTED IS SUBSTANTIAL

> Petitioners' acts in ordering or performing body cavity searches of the male inmates of the maximum security unit of the state prison in response to what the Director perceived to be a life-threatening situation did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Confined felons contending that institutional security measures intrude impermissibly upon their "constitutional rights" bear a burden which makes recovery rare. The remedies provided by *42 U.S.C. § 1983* are unavailable to prisoners unless the prison policy or practice complained of violates some

constitutional right. *See Parratt v. Taylor*, 451 U.S. 527, 535 (1981) and *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

This is an exacting requirement because the judicially recognized constitutional rights of prisoners are few in number. For example, prisoners are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment, *Lee v. Washington*, 390 U.S. 333 (1968); they retain the constitutional right to petition the Government for the redress of grievances, *Johnson v. Avery*, 393 U.S. 483 (1969); they enjoy a restricted religious freedom under the First and Fourteenth Amendments, *Cruz v. Beto*, 405 U.S. 319 (1972); they retain those First Amendment rights that are not inconsistent with their

status as prisoners or with the legitimate penological objectives of the corrections system, *Pell v. Procunier*, 417 U.S. 817 (1974); they enjoy the protections of due process, *Wolff v. McDonnell*, 418 U.S. 539 (1974); they are protected from "deliberate indifference" to their serious medical needs, *Estelle v. Gamble*, 429 U.S. 97 (1976); they are protected against the "unnecessary and wanton infliction of pain," *Whitley v. Albers*, 475 U.S. _____, 106 S.Ct. 1078 (1986); and they enjoy a constitutionally protected marital relationship, *Turner v. Safley*, ____ U.S. ____, 107 S.Ct. 2254 (1987).

Although there may be a few more constitutional rights announced in some lower court opinions and although there are certainly more according to the prisoners and their

attorneys, the preceding few cases compose this Court's complete catalog of constitutional rights retained by prisoners.[1/]

This Court's typical opinion in a prisoner case begins with a general statement like -- "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison[,]" *Bell v. Wolfish*, 441 U.S. 520, 545 (1979), but ends with a specific finding that the Constitution does not contain the protection claimed.[2/] The reason for this

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1/ Conspicuously and significantly absent from this catalog of constitutional rights is Fourth Amendment protection.

2/ In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court prefaced its opinion, finding due process protection for prisoners, with this statement: "There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 555-56. (continued)

judicial ambivalence on the subject of constitutional rights of prisoners is that extension of the panoply of constitutional protection to the prison context would threaten the core functions of prison administration, *i.e.*, preventing escape and maintaining internal security.

Since 1948 this Court has counseled that -- "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334

2/ (cont) The Court subsequently paid lip service to this statement in six other opinions, but failed to find a single constitutional violation in any of the six cases. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Block v. Rutherford*, 468 U.S. 576 (1984); and *Hudson v. Palmer*, 468 U.S. 517 (1984).

U.S. 266, 285 (1948). This principle was reiterated as recently as June, 1987 and given this clarification: "The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives -- including deterrence of crime, rehabilitation of prisoners, and institutional security. *O'Lone v. Estate of Shabazz*, ____ U.S. _____, 107 S.Ct. 2400, 2404 (1987).

Security is the *raison d'etre* of our prison system. All other correctional goals are dependent upon it. "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 823 (1974). Guided by this paramount principle, this Court has consistently upheld correctional security measures that arguably impinged upon constitutional rights

Another guiding principle in prisoner civil rights cases is that of judicial deference to the decisions of prison officials on security issues. In its landmark case of *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court laced its opinion with instructions on this theme. *Bell* was viewed, rightfully or wrongfully, by prison administrators as an attempt by this Court to cool what it considered to be too much judicial involvement with correctional administration. The opinion was viewed as an admonition from this Court, in plain English, to the lower federal courts to implement a policy of judicial deference to the decisions of prison administrators on issues of institutional security.

Prison administrators found the following passages reassuring:

> Prison officials must be free to take appropriate action to ensure the safety of inmates

> and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee . . . the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.
>
> . . .
>
> Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security
>
> . . .
>
> . . . judicial deference is accorded not merely because the adminstrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Id. at 547-48.

In *Block v. Rutherford*, 468 U.S. 576 (1984), the Court had this comment on the principles it had emphasized in *Wolfish*:

> In *Wolfish* itself, we characterize the maintenance of security, internal order and discipline as "essential goals," which at times require the "limitation or retraction of retained constitutional rights." Government, we said, "must be able to take steps to maintain security and order at [an] institution and make certain no weapons or elicit drugs reach detainee.

Id. at 586 n. 8 (citations omitted).

In *Rhodes v. Chapman*, 452 U.S. 337, 349 n. 14 (1981), this Court said simply -- "A prison's internal security is peculiarly and normally left to the discretion of prison administrators . . ." In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court gave specific support[3/] for its policy

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3/ "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, (continued)

of judicial deference on security issues and said:

> Within this volatile 'community,' prison administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors. They are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves. They must

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3/ (cont) and often violent, conduct. Inmates have necessarily shown a lapse in ability to contol and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others. Even a partial survey of the statistics on violent crime in our Nation's prisons illustrates the magnitude of the problem. During 1981 and the first half of 1982, there were over 120 prisoners murdered by fellow inmates in state and federal prisons. A number of prison personnel were murdered by prisoners during this period. Over 29 riots or similar disturbances were reported in these facilities for the same time frame. And there were over 125 suicides in these institutions." *Hudson*, 468 U.S. at 526.

> be ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize.

Id. at 526-27.

Last year, the Court stated in *Whitley v. Albers*, 475 U.S. _____, 106 S.Ct. 1078 (1986), that during periods of unrest,

> . . . the admonition that 'a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators' *Rhodes v. Chapman*, 452 U.S., at 349, n.14, 101 S.Ct., at 2400, n.14, carries special weight. 'Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' *Bell v. Wolfish*, 441 U.S., at 547, 99 S.Ct., at

> 1878. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, *just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline.* It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.

106 S.Ct. 1078, 1085 (emphasis added).

To cap this summary of this Court's consistent comments on its policy of judicial deference, we have this statement from *O'Lone v. Estate of Shabazz*, ____ U.S. ____, 107 S.Ct. 2400 (1987),

> We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on . . . difficult and sensitive matters of institutional administration,' Block v. Rutherford, 468 U.S. 576, 588, 104 S.Ct. 3227, 3233, 82 L.Ed.2d 438 (1984), for the determination of those charged

> with the formidable task of running a prison.

Id. at 2407.

Since *Wolfish*, the rule in prison cases has been one of judicial deference to the decisions of prison officials on security issues. Not a single case has been found where this Court has sustained a lower court in substituting its judgment for that of prison officials on a security matter.[4/] The role of the prison administrator is not an easy one. Danger and uncertainty come with the job. Swift and vigorous decision-making is often

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4/ The only caveat is the recent case of *Turner v. Safley*, ____ U.S. _____, 107 S.Ct. 2254 (1987). There, a Missouri prison regulation prohibited marriages between inmates and civilians and between inmates and inmates. Both security and rehabilitation concerns were urged in support of the regulation. This Court correctly concluded, however, that it was not reasonably related to either of purported penological interests. *Id.* at 2266.

required in order to save lives and protect property. Lawsuits inevitably follow most major decisions and many minor ones. Under such circumstances, an immunity defense is the *sine qua non* for fearless and effective governance of our penal institutions, and accordingly, prison officials are included in the class of public officials who are covered by qualified immunity.

In *Procunier v. Navarette*, 434 U.S. 555 (1978), this Court held that qualified immunity protects prison officials at both the supervisory, high discretion level and at the subordinate, ministerial, minimal discretion level. This official immunity defense, however, was not judicially cast as an effective shield against liability until *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Prior to *Harlow*, the immunity defense envisoned by the Court in *Butz v.*

Economou, 438 U.S. 478 (1978), and extended to corrections officials in *Procunier v. Navarette*, 434 U.S. 555 (1978), had been vitiated by the lower court practice of habitually allowing cases to proceed to trial. In order to revitalize the defense so that it would accomplish the purposes alluded to in *Butz*, this Court adopted a purely objective standard for determining the applicability *vel non* of qualified immunity:

> Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

> have known. *See Procunier v. Navarette*, 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978); *Wood v. Strickland*, 420 U.S., at 322, 95 S.Ct. at 1001.

Harlow, 457 U.S. at 817-18.

The Court explained its reasons for adopting a purely objective standard as follows:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be

> allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Id. at 818-19.

In *Harlow*, this Court refined the qualified immunity defense so as to facilitate "the resolution of many insubstantial claims on summary judgment" and to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery" if the norms the officials were charged with violating were not clearly established at the time. *Id.* at 817-18.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court vitalized its

decision in *Harlow* by holding that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Id.* at 530. The Court explained why immediate appealability was a practical necessity in light of *Harlow* as follows:

> *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's

> decision is effectively unreviewable on appeal from a final judgment.

Id. at 526-27.

The concerns the Court expressed as the basis for its decision in *Harlow* are so significant that they justify an exception to the normal requirement of a "final judgment" as the predicate for an appeal.

Under *Harlow*, the critical consideration is -- whether the law was "clearly established" at the time of the conduct which is the gravamen of the complaint. 457 U.S. at 818. If it was not, public officals have the right not to stand trial and must be dismissed from the suit. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law") and *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (public officials are immune unless "the law clearly proscribed the actions"

they took).

On June 25, 1987, the Court provided additional guidance to the lower courts concerning the process for determining "clearly established" law:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, *see Mitchell*, 472 U.S., at 535, n. 12, 105 S.Ct., at 2820, n. 12; but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, _____ U.S. _____, 107 S.Ct. 3034, 3038-39 (1987).

Under the *Anderson* clarification of *Harlow*, a public official is entitled to immunity unless the contours of the right at issue are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3039.

The sole motivation for the searches complained of in this case was a genuine concern for the life and safety of inmates and staff at the Arizona State Prison at Florence. On March 15, 1984, Dr. James G. Ricketts, Director of the Department of Corrections, received information from his Inspector General, Lloyd Bramlett, that there was a serious security problem at the prison, i.e., explosives in the maximum security unit, Cell Block 6 (CB-6). *See* App. C at 31a. Director Ricketts believed that the facility was in danger of being blown up and that immediate action was necessary. *Id.* at 32a. And since it was a life-threatening situation, he did not consider alternatives to digital rectal cavity searches. *Id.* at 33a-34a. Approximately thirteen inmates were searched on March 15, 1984, and explosives were recovered as a result of those

searches. *Id.* at 39a.

Subsequent to the searches on March 15, 1984, a second set of searches was conducted involving the entire population of the maximum security unit. In Director Ricketts's opinion the second set of searches was necessary in order to get the contraband out of CB-6. *Id.* at 35a-36a. He felt that the second set of searches needed to be broader than the first set because the contraband could have been in any area of CB-6. *Id.* at 37a. He believed the searches to be legal.

> Q. You believed it to be legal?
>
> A. Totally legal. If I had a doubt whatsoever, I wouldn't have done it.
>
> Q. What would have made it illegal? I'm sorry, what would have made the searches illegal?
>
> A. I don't know. If there had been case law that indicated that this was violating someone's

> constitutional right to do that, I wouldn't have done it.
>
> Q. You weren't aware of any case law?
>
> A. That indicated that it was violating their constitutional -- no, and I'm still not.

Id. at 38a.

In light of contemporaneous case law, Director Ricketts's belief that the searches were legal was not unreasonable.

In March of 1984 it was not apparent, in the light of preexisting law, that the searches approved by Director Ricketts were unlawful. The only relevant opinion at the time was *Bell v. Wolfish*, 441 U.S. 520 (1979), and that opinion had upheld the practice of conducting visual body cavity searches without articulating any particularized cause for doing so. Consequently, the signal sent by that case to correctional officials was not a red light or even a yellow light, but rather a

green light.

The issue of whether prisoners have any interests which are subject to Fourth Amendment violation has never been resolved by this Court. In *Bell*, the Court said:

> However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, see *Lanza v. New York, supra; Stroud v. United States*, 251 U.S. 15, 21, 40 S.Ct. 50, 52, 64 L.Ed. 103 (1919), we nevertheless conclude that these searches do not violate that amendment.

441 U.S. 520, 558.

The signal sent by the Court's reference to *Lanza v. New York*, 370 U.S. 139 (1962) and *Stroud v. United States*, 251 U.S. 15 (1919) was -- prisoners probably have no Fourth Amendment rights, but even if they do, it doesn't make any difference here. Both *Lanza* and *Stroud* suggest that

prisoners retain no interests which are protected by the Fourth Amendment.

Convicts' claims to Fourth Amendment coverage were made even more dubious by this Court's decision in *Hudson v. Palmer*, 468 U.S. 517 (1984):

> A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.

Id. at 527-28.

The language that the "right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates" could reasonably be interpreted to mean

that inmates have no Fourth Amendment protection. In sum, nothing in *Bell* or any subsequent decision of this Court would cause a reasonable official to pause before ordering digital rectal cavity searches as a response to a serious threat to institutional security.

The panel of the Ninth Circuit which affirmed the district court's refusal to grant Director Ricketts, and the other petitioners, qualified immunity did so solely on the ground that the *manner* in which the searches were conducted violated "clearly established standards:"

> Although the information regarding the presence of explosives in the maximum security unit of the ASP may have provided reasonable cause for the searches, we find it unnecessary to resolve whether it was clearly established that prison officials must have reasonable cause for such a search or whether such cause existed here. Regardless of the strength of the officials'

> justification, the *manner* in which Vaughan alleges the searches were conducted violated clearly established standards. A refusal to grant qualified immunity on the fourth amendment claim was appropriate on that ground alone.

Vaughan v. Ricketts, 859 F.2d 736, 740 (9th Cir. 1988).

The issue of whether qualified immunity is available to those petitioners like Director Ricketts, and others, who participated in the decision-making that authorized the searches, but who did not participate in conducting the searches is left unresolved by the Ninth Circuit's opinion.[5/] Moreover, in deciding to

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5/ Principles distilled from *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), indicate that if the sole basis for denying immunity was the *manner* of searching, then those petitioners who did not participate in conducting the searches could not have violated "clearly established statutory or constitutional rights."

predicate the denial of immunity solely on the *manner* in which the searches were conducted, the Ninth Circuit leapfrogs over the threshold issue of Fourth Amendment applicability in order to decide the contingent issue of Fourth Amendment compliance.

Our position on the primary issue of applicability *vel non* of the Fourth Amendment to convicted felons in maximum security is that prior to March 1984, neither the decisions of this Court nor the decisions of the Ninth Circuit clearly established a maximum security prisoner's right to any protection under the Fourth Amendment. In fact, the decisions of this Court could reasonably be interpreted as denying such protection.

The Ninth Circuit's reliance upon the Eighth and Fourteenth Amendments as grounds for denying immunity is also without support in the decisions of this

Court. In *Whitley v. Albers*, ____ U.S. ____, 106 S.Ct. 1078 (1986), it was made clear that prisoners could not successfully sustain a claim for violation of substantive due process under the Fourteenth Amendment unless the complained of conduct was egregious enough to constitute a violation of the Eighth Amendment:

> Accordingly, we consider whether the Due Process Clause could serve as an alternative basis for affirmance.
>
> We need say little on this score. We think the Eighth Amendment which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. . . . Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to that question outside the prison security context *by*

> ***holding, as we do, that in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause.***

Id. at 1088 (emphasis added).

Consequently, the manner of conducting these searches didn't violate any constitutional rights unless it violated "clearly established" rights under the Eighth Amendment. The district court and the court of appeals framed the Eighth Amendment issue in terms of "deliberate indifference" to serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97 (1976). This may be appropriate for the few prisoners who had "serious medical needs" as a consequence of the searches, but it misses the mark for all who did not. The correct standard is the "unnecessary and wanton infliction of pain" standard:

> Not every governmental action affecting the interests

> or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. "After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'

Whitley, 106 S.Ct. at 1084.

The Tenth Circuit has provided the other circuits with this practical formula for determining when conduct amounts to the "unnecessary and wanton infliction of pain:"

> First, 'wanton' requires that the guard have intended to harm the inmate. Second, 'unnecessary' requires the force used to have been more than appeared reasonably necessary at the time of the use of force to maintain or restore discipline. Third, 'pain' means more than momentary discomfort; the attack must have resulted in either severe pain or a lasting injury.

Sampley v. Ruettgers, 704 F.2d 491, 495 (10th Cir. 1983).

Respondents have the burden[6/] of showing that the facts alleged in their complaints constitute the "unnecessary and wanton infliction of pain." We submit that the application of the *Sampley* test to those facts demonstrates that they have not carried this burden.[7/]

6/ The one part of the district court's opinion with which we do not disagree is its conclusion that the burden of overcoming the qualified immunity defense by demonstrating the existence of a clearly established right rests with the respondents. *Vaughan v. Ricketts*, 663 F.Supp. 401, 403, n. 3 (D. Ariz. 1987).

7/ Perhaps, there may have been an isolated incident or two where a particular petitioner intended to harm a particular respondent or used more force than was reasonably necessary to effect the search of a particular respondent, and perhaps, there may have been a few isolated incidents where a particular respondent suffered either severe pain or a lasting injury. The district court, however, did not identify any such incidents nor base its order upon any such incidents. If counsel for respondents can point to any such incidents in the record, a remand may be appropriate to determine the question of qualified immunity for those petitioners involved in any such incidents. *See Anderson v. Creighton*, 107 S.Ct. at 3042-43 n. 6.

A comparison of the alleged misconduct in this case with the misconduct in those cases in which the Ninth Circuit has found the misconduct egregious enough to constitute constitutional encroachment also demonstrates that respondents have not met their burden. For example, in *Meredith v. Arizona*, 523 F.2d 481 (9th Cir. 1975), the complaint alleged an "unprovoked assault and battery by [a] guard upon a prisoner known by the guard to be suffering from an attack of emphysema, by striking him in the solar plexus, hard enough that the 'attack rendered the patient plaintiff totally handicapped.'" 523 F.2d at 485.

In *Gaut v. Sunn*, 792 F.2d 874 (9th Cir. 1986), the plaintiff alleged that "he was severely beaten, kicked, choked, and thrown against the wall by several guards when he shuffled his feet during a

prison 'shakedown,' and was beaten again while handcuffed after he was taken to a holding unit." 792 F.2d, at 875. And in *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986), plaintiff accused a guard of injuring him during a strip search by attempting to plunge a riot stick into his anus. One of his hemorrhoids was ruptured by the guard's alleged brutality. 795 F.2d at 781-782.

In all three of these cases, the Ninth Circuit held that the egregious conduct and serious harm alleged was sufficient to constitute a violation of the Constitution. But it has also held that less serious conduct and less serious harm does not. *See Rutledge v. Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981). It is well settled that the protection provided by the Eighth Amendment against cruel and unusual punishment is "nowhere

nearly so extensive as that afforded by the common law tort action for battery." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied* 414 U.S. 1033 (1973).

What is not so well settled is the point of demarcation.[8/] Here, both the district court and the court of appeals erred by drawing the line between cruel and unusual punishment and assault and battery where they did. The Ninth Circuit should have adopted the Tenth Circuit's analysis in *Sampley*.

However, drawing a line between constitutional torts under *42 U.S.C. § 1983* and common law torts under principles of state law is not a satisfactory

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8/ Judge Friendly's guidelines in *Johnson* are helpful. They, of course, require a finding of serious injury as one prerequisite for converting an ordinary tort into a constitutional tort.

solution[9/] to a serious problem. It is also very expensive.[10/] A sensible solution to this problem was recently proposed by a veteran judge of the Ninth Circuit. *See Gaut v. Sunn*, 792 F.2d 874, 876 (9th Cir. 1986) (Sneed, J., concurring) and *Mann v. City of Tucson*, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring). Judge Sneed's proposal would extend this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), to all constitutional injuries cognizable under § *1983* except those based upon an alleged unconstitutional state law, policy,

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9/ Where the line is drawn inevitably varies from district court to district court and from court of appeals to court of appeals.

10/ In 1985 a single hour spent by a federal judge on a case cost taxpayers Six Hundred Dollars ($600.00). Levin and Colliers, "Containing the Cost of Litigation," 37 Rutgers L. Rev. 219, 227 (1985).

procedure, pattern, or practice. *See Mann v. City of Tucson*, 782 F.2d at 798. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Several circuits have already extended *Parratt* to cover deprivation of liberty situations. *See, e.g., Birkenholz v. Sluyter*, 857 F.2d 1214, 1217 (8th Cir. 1988) and *Wilson v. Beebe*, 770 F.2d 578, 584 (6th Cir. 1985) (*en banc*). Other circuits, however, have placed a "substantive due process" limitation on the use of *Parratt*. *See, e.g., Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988), *Mann v. City of Tucson*, 782 F.2d 790 (9th Cir. 1986), and *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984). The circuits imposing the "substantive due process" limitation[11/]

11/ In these circuits the *Parratt* bar is inapplicable if the plaintiff alleges the violation of a substantive right under either the Bill of Rights or the Due Process Clause.

on *Parratt* are fond of the following passage:

> *Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air. *Parratt* applies only when the plaintiff alleges a deprivation of procedural due process; it is irrelevant when the plaintiff has alleged a violation of some substantive constitutional proscription. Further, in the context of procedural due process, *Parratt* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural safeguards is impracticable or infeasible.

Augustine v. Doe, 740 F.2d at 329.

Read broadly, however, *Parratt* could be transformed into a magic wand that would transfer cases such as this from federal court to state court. *Parratt* could be read to free the federal courts from the current confusion and consumption of resources caused by constitutional line-drawing. *Parratt* could be utilized to place beyond the

reach of § *1983* any loss that "did not occur as a result of some established state procedure." *Parratt*, 451 U.S. at 543. This broad reading of *Parratt* would weed out of federal court all actions for which remedies were available in state court, except those "based upon an alleged unconstitutional state law, policy, procedure, pattern, or practice." 782 F.2d at 798.

This solution to the tension inherent in § *1983* litigation would have several benefits. First, it would restore vitality to § *1983*. The stature of the statute has been diminished in the past two decades due to the trivial concerns commonly urged pursuant to it. A broadening of *Parratt* would restore § *1983* to its proper, pristine, powerful role in our constitutional order.[12/]

12/ "Our Constitution deals with the large concerns of the (continued)

Second, it would result in a tremendous savings in terms of federal judicial resources.[13] And third, it would result in these cases being handled by the tribunals that should be handling them.[14]

12/ (cont.) governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 666 (1986).

13/ Our district court and, presumably, other district courts around the country are presently engaged in time management studies in an effort to quantify the amount of time spent on prisoner litigation.

14/ The protection of constitutional rights is not the exclusive domain of the federal courts. State courts share this responsibility. "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . ." *Robb v. Connolly*, 111 U.S. 624, 637 (1884). In recent years state courts have demonstrated both competency and commitment in (continued)

In *Monroe v. Pape*, 365 U.S. 167 (1961), Justice Frankfurter argued in dissent that the majority opinion would constitutionalize every act by a state official. *See* 365 U.S. at 240-42. His argument has proven prophetic.[15/]

Ten years ago, the Chief Justice suggested that "the time may now be ripe for a reconsideration of the Court's conclusion in *Monroe* that the 'federal

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14/ (cont) protecting constitutional rights. *See, e.g.*, Brennan, William J., Jr., "State Constitutions and the Protection of Individual Rights." 90 *Harv. L. Rev.*, 489 (1977) and Brennan, William J., Jr., "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights." 61 *N.Y. Univ. L. Rev.* 535 (1986). A strong case can be made for the argument that state courts are better equipped than federal courts to deal with the cases in which a public official's conduct could be either tortious or unconstitutional in nature.

15/ Presently, § *1983* has practically supplanted traditional tort law for all cases in which the plaintiff is a prisoner, except those involving injury to or loss of property.

remedy is supplementary to the state remedy . . .'" *City of Columbus v. Leonard*, 443 U.S. 905, 910 (1979) (Rehnquist, J., dissenting). Now, ten years later, it is definitely time to do so. Today, there is no reason to believe that state courts cannot or will not provide adequate remedies for all deprivations, whether constitutional or tortious in nature, that are not "a result of some established state procedure." *Parratt*, 451 U.S. at 541.

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted and the decision of the United States Court of Appeals for the Ninth Circuit reversed.

Respectfully submitted,

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January 10, 1989

TABLE OF APPENDICES

		Page
A.	Opinion of Court of Appeals October 14, 1988	1a
B.	Opinion of District Court May 29, 1987	13a
C.	Testimony From the Depositions of Dr. James D. Ricketts and James D. Morgan	18a

APPENDIX A

Opinion of Court of Appeals
October 14, 1988

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACY RAY VAUGHAN, et al., *Plaintiffs-Appellees,* v. JAMES D. RICKETTS, et al., *Defendant-Appellant.*	No. 87-2526 D.C. No. CIV 84-624-PHX-CAM OPINION

Appeal from the United States District Court
for the District of Arizona
C. A. Muecke, District Judge, Presiding

Argued and Submitted
April 15, 1988—San Francisco, California

Filed October 14, 1988

Before: Procter Hug, Jr.* and Robert Boochever, Circuit Judges, and Albert Lee Stephens, Jr.,** District Judge.

Opinion by Judge Boochever

*Judge Hug was drawn to replace Judge Anderson.

**Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Search and Seizure/Criminal Procedure

Affirming a judgment denying qualified immunity to a prison official for body cavity searches, the court held that, at the time of the searches, there was a reasonable grounds standard for initiation of digital body cavity searches of inmates and that such searches failed to withstand fourth amendment scrutiny.

Appellee Tracy Vaughan and other inmates were subjected to a series of digital rectal cavity searches in March 1984. Vaughn sued under 42 U.S.C. § 1983 alleging deprivation of his constitutional rights. Appellant James Ricketts, the director of the Arizona Department of Corrections, and others, appeal the district court's denial of their summary judgment motion. Ricketts claimed a qualified immunity from suit because the law governing body cavity searches of inmates was not clearly established as of March 1984.

[1] Government officials performing discretionary functions enjoy a qualified immunity from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [2] By 1982, courts' had found that inmates retained some fourth amendment protection from unreasonable searches of their persons. [3] Regardless of the strength of the officials' justification, the *manner* in which Vaughan alleges the searches were conducted violated clearly established standards. [4] Privacy, hygiene, training of those conducting the searches and the place where the search was conducted are relevant issues determining whether the manner of the search was reasonable. [5] Established law at the time of the searches provided that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the eighth

amendment. [6] The manner in which Vaughan alleges the searches were conducted constitutes an unnecessary use of force showing a wanton disregard for the health and safety of the inmates. [7] At the time of the searches, the fourteenth amendment prohibited prison officials from treating prisoners in a fashion so brutal and offensive to human dignity as to shock the conscience. Under the facts alleged, a reasonable prison official in 1984 would have understood that the searches were conducted in a brutal fashion that was not justified by a need for force.

COUNSEL

Ronald J. Greenhalgh, Assistant Attorney General, Phoenix, Arizona, for the defendants-appellants.

Robert Bartels, Arizona State University Law School Clinic, Tempe, Arizona, for the plaintiffs-appellees.

OPINION

BOOCHEVER, Circuit Judge:

Ricketts, the director of the Arizona Department of Corrections, and other prison officials (Ricketts) appeal the district court's denial of their summary judgment motion. Ricketts contends that he is entitled to qualified immunity from suit under 42 U.S.C. § 1983 by Vaughan and other plaintiffs (Vaughan), all inmates at the Arizona State Prison at Florence (ASP), alleging that a series of digital rectal cavity searches violated their constitutional rights. Ricketts also suggests that the individual liability of particular defendants is before the court on this appeal. We find that the district court did not err in denying Ricketts' claim of qualified immunity. The denial of summary judgment is AFFIRMED.

FACTS

Vaughan and approximately eighty inmates of the maximum security unit at ASP were subjected to a series of digital rectal cavity searches on the 15th, 22nd, and 23rd of March 1984. Vaughan alleges that correctional medical assistants untrained in involuntary rectal cavity searches conducted them on a table in an open hallway, within view of prison personnel and some inmates. He alleges that the conditions were unsanitary, that some inmates who resisted were forced to submit, and that those searching made no effort to determine whether any of the inmates had medical conditions that would make a digital rectal cavity probe medically inadvisable. Ricketts had ordered the searches in response to information that there were explosives in the maximum security unit; the March 15 searches recovered some gunpowder.

Vaughan filed suit under 42 U.S.C. § 1983 alleging deprivation of rights under the fourth, eighth, and fourteenth amendments of the United States Constitution. Ricketts moved for summary judgment, claiming a qualified immunity from suit because the law governing body cavity searches of inmates was not clearly established as of March 1984. In its order denying Ricketts' motion, the district court held that Supreme Court and Ninth Circuit decisions before March 1984 clearly established a "reasonable grounds" standard for initiation of digital body cavity searches of inmates. The court concluded that it was also clearly established that body cavity searches must be "reasonably conducted in order to withstand fourth amendment scrutiny." Finally, the district court found that clearly established standards existed under the eighth and fourteenth amendments as well. The court thus refused to grant Ricketts qualified immunity on any of Vaughan's claims.

ANALYSIS

We generally do not permit appeals from denials of summary judgment. The Supreme Court has held, however, that

an interlocutory order denying qualified immunity is effectively unreviewable on appeal from final judgment, conclusively determines the issue in dispute, and is conceptually separate from the merits of the plaintiff's claim. *Mitchell v. Forsyth*, 472 U.S. 511, 526-28 (1985). "[T]o the extent that it turns on an issue of law," such an order is immediately appealable. *Id.* at 530. Assuming that Vaughan can prove the acts attributed to Ricketts, we must decide the entirely legal issue of "whether the facts alleged . . . support a claim of violation of clearly established law." *Id.* at 528 n.9.

[1] Government officials performing discretionary functions enjoy a qualified immunity from liability for civil damages so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The *Harlow* test focuses upon the "objective reasonableness" of the official's conduct. *Id.* Ricketts is entitled to summary judgment granting him qualified immunity if he can establish that "a reasonable officer could have believed that the search comported with [the Constitution] even though it actually did not." *Anderson v. Creighton*, 107 S. Ct. 3034, 3036 (1987). For a finding that the right was "clearly established" at the time the action was taken, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3039.

FOURTH AMENDMENT

To determine whether, at the time of the searches in March 1984, Vaughan enjoyed "clearly established . . . constitutional [fourth amendment] rights of which a reasonable person would have known," *Harlow*, 457 U.S. at 818, we must review "all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established." *Ward v. County of*

San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3623 (1987).

[2] Ricketts asserts that it was not clearly established that prisoners retain any fourth amendment rights. We disagree. By 1982, the majority of the circuits had considered the question, each holding that inmates retained some fourth amendment protection from unreasonable searches of their persons. *See Bonitz v. Fair*, 804 F.2d 164, 171 (1st Cir. 1986) (citing opinions from the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth circuits). In *United States v. Savage*, 482 F.2d 1371, 1372 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974), this court held that "[a] prisoner is entitled to the fourth amendment's protection from unreasonable searches and seizures." That "abstract right[ ]" in itself, however, is not enough to show that the law was clearly established in this case; the law regarding body cavity searches of inmates in 1984 must be so clear that "the unlawfulness [of the officials' conduct is] apparent" to the reasonable official. *Anderson*, 107 S. Ct. at 3039.

In 1979, the Supreme Court held in *Bell v. Wolfish* that routine visual body cavity inspections of pretrial detainees must be reasonable under the fourth amendment. 441 U.S. 520, 558 (1979). A determination of whether a challenged search is reasonable

> requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559.

[3] In *Ward*, this court held that *Wolfish* clearly established as of 1981 that the justification for initiating blanket strip

searches of minor offense arrestees must be "reasonable." 791 F.2d at 1332-33. The district court in this case relied on *Ward* to find that the same standard of "reasonable grounds" was clearly established as regarded digital rectal cavity searches of inmates. Although the information regarding the presence of explosives in the maximum security unit of the ASP may have provided reasonable cause for the searches, we find it unnecessary to resolve whether it was clearly established that prison officials must have reasonable cause for such a search or whether such cause existed here. Regardless of the strength of the officials' justification, the *manner* in which Vaughan alleges the searches were conducted violated clearly established standards. A refusal to grant qualified immunity on the fourth amendment claim was appropriate on that ground alone.

The Supreme Court in 1979 emphasized that any consideration of whether routine visual body cavity searches of inmates were reasonable involved an assessment of the manner in which the searches were conducted. *Wolfish*, 441 U.S. at 559. In finding the search before it reasonable, the Court pointed out that no touching was involved. *Id.* at 558 n.39. The Court elaborated:

> We do not underestimate the degree to which these [visual] searches may invade the personal privacy of inmates. Nor do we doubt . . . that on occasion a security guard may conduct the search in an abusive fashion. Such an abuse cannot be condoned. The searches must be conducted in a reasonable manner.

Id. at 560 (citations omitted).

Courts of appeals finding body cavity searches constitutional before the ASP searches in 1984 were careful to note that the manner in which the searches were conducted was reasonable. *Daughtery v. Harris*, 476 F.2d 292, 294 (10th

Cir.), *cert. denied,* 414 U.S. 872 (1973), held that routine physical rectal searches of inmates before court appearances were reasonable "unless contradicted by a showing of wanton conduct." The court continued:

> Of course, any search should be conducted by prison officials under judicious circumstances. . . . The searches were here conducted according to the directives issued by the Bureau of Prisons . . . and the examinations were carried out by *trained paraprofessional medical assistants in a designated area and under sanitary conditions. Also, there was no attempt on the part of officials or medical personnel to humiliate or degrade the appellants.*

Id. at 295 (citations omitted) (emphasis added). In *United States v. Lilly,* 576 F.2d 1240, 1246 (5th Cir. 1978), the court required that body cavity "search[es] and any consequent seizure [must be] conducted in a reasonable manner." *Lilly* upheld the constitutionality of a body cavity search of a female inmate where the "search was conducted by a female medical officer in the prison clinic in the presence of only the medical officer and a female correctional officer." *Id.* at 1247.

The Sixth Circuit in 1983 found the strip search of a felony arrestee proper under *Wolfish* where the search was visual only, conducted in private by a same-sex attendant, and there was "no claim of offensive behavior . . . beyond that inherent in the nature of the inspection itself." *Dufrin v. Spreen,* 712 F.2d 1084, 1087 (6th Cir. 1983).

In a case involving qualified immunity issues similar to those presented here, the First Circuit found that in light of the law prevailing in 1981, inmates had a clearly established fourth amendment right to be free from a body-cavity search conducted in an unreasonable manner. *Bonitz v. Fair,* 804 F.2d 164, 173 (1st Cir. 1986). The court emphasized that facts alleged by the female inmates made the search unreason-

able under the then-prevailing case law: The physical body cavity searches involved touching by police officers, not medical personnel, who did not change gloves between searches, and male officers peered through doors to observe the searches. *Id.* at 169, 172.

[4] We hold that it was clearly established by 1984 that body cavity searches of inmates must be conducted in a reasonable manner, and that issues of privacy, hygiene, and the training of those conducting the searches are relevant to determining whether the manner of search was reasonable. It was also clear that the place in which the search was conducted must be considered in judging the search's reasonableness. *Wolfish,* 441 U.S. at 559. We now address the "fact-specific" question whether Ricketts could have believed the March 1984 searches "to be lawful, in light of clearly established law." *Anderson,* 107 S. Ct. at 3040.

Vaughan alleges he was searched on a table in an open hallway, by medical assistants untrained in involuntary body cavity searches. The table was not sanitary, and the medical assistants did not wash their hands between searches. The area was clearly visible to other inmates and prison personnel, and some personnel made jokes and insulting comments. No official made an inspection of medical records to ensure that individual inmates did not have medical conditions that made the searches dangerous. Inmates who resisted were forced to submit. At least one inmate search repeated later in the medical unit was visible to female personnel. No reasonable officer could believe that such searches were conducted in a reasonable manner, and so Ricketts was not entitled to qualified immunity on Vaughan's fourth amendment claim.

EIGHTH AMENDMENT

[5] Clearly established law at the time of the searches in March of 1984 provided that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary

and wanton infliction of pain' . . . proscribed by the Eighth Amendment" and its prohibition against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). It was also clearly established that deliberate indifference to the "safety needs" of prisoners, as shown by prison administrators' indifference to brutal behavior by guards toward inmates, was sufficient to state an eighth amendment claim. *Hoptowit v. Ray*, 682 F.2d 1237, 1249-50 (9th Cir. 1982). On appeal, Ricketts does not dispute that clearly established law existed on the eighth amendment issue, but instead asserts that the searches did not violate the prevailing standard.

Vaughan alleges that deliberate indifference to the inmates' medical needs was shown by the lack of hygiene during the searches, by the lack of training of the searchers, by the failure to check inmates' medical records before performing the searches, and by further rectal cavity searches made on inmates who were removed to the prison health unit after the searches in the hallway. At least one of the inmates removed to the health unit was subjected to a rectal probe by a female doctor with a metal clamp, even though he resisted, and his subsequent rectal bleeding was left unattended.

[6] Taking all Vaughan's allegations as true, Ricketts cannot claim that the prison officials enjoy qualified immunity from suit for eighth amendment violations. As required for an eighth amendment violation the searches as described show more than mere negligence. The manner in which Vaughan alleges the searches were conducted constitutes an unnecessary use of force showing a wanton disregard for the health and safety of the inmates. *Compare United States v. Caldwell*, 750 F.2d 341 (5th Cir. 1984) (no eighth amendment violation where rectal search was called off when possibility of injury arose, and no unnecessary force was used), *cert. denied*, 471 U.S. 1007 (1985).

Ricketts claims that it may be more difficult to show an eighth amendment violation in light of a prison security mea-

sure. In *Whitley v. Albers*, 475 U.S. 312 (1986), the Supreme Court held that in the context of quelling a prison disturbance, the question of whether an eighth amendment violation occurred turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)). The circumstances under which Ricketts ordered the searches, while involving a threat to security, did not constitute an ongoing prison disturbance. Unlike *Whitley*, the officers were not confronted with an instantaneous decision whether to conduct the searches in the manner described.

We find that a reasonable official would understand, under law clearly established in 1984, that the conditions and manner under which Vaughan alleges the searches were conducted constituted deliberate indifference to the inmates' medical and safety needs. Ricketts was not entitled to sovereign immunity on Vaughan's eighth amendment claim.

FOURTEENTH AMENDMENT

[7] At the time of the searches in March of 1984, it was clearly established that the fourteenth amendment prohibited prison officials from treating prisoners in a fashion so "brutal" and "offensive to human dignity" as to "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172, 174 (1952) (*quoted in Meredith v. Arizona*, 523 F.2d 481, 483 (9th Cir. 1975). Conduct that amounts to brutality violates a liberty interest protected by the fourteenth amendment's due process clause, the right to be secure in one's person. *Meredith*, 523 F.2d at 482. In determining whether force amounts to brutality,

> a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the

> extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 483 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).

[8] This standard was clearly established in 1984. Thus, in order for Vaughan to avert Rickett's claim of qualified immunity under the fourteeneth amendment, he must show that a reasonable prison official would have known that the digital rectal searches, conducted as alleged, were "maliciously and sadistically applied for the purpose of causing harm." Under the facts as alleged by Vaughan, a reasonable prison official in 1984 would have understood that the searches were conducted in a brutal fashion that was not justified by a need for force. The extent of possible injury was great, and at least one inmate suffered significant injury. The joking and insults directed at the inmates support an inference that the force was maliciously and sadistically applied. Ricketts was not entitled to qualified immunity on Vaughan's fourteenth amendment claim.

CONCLUSION

We AFFIRM the district court's refusal to grant Ricketts qualified immunity from Vaughan's claims under the fourth, eighth, and fourteenth amendments.

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APPENDIX B

Opinion of District Court
May 29, 1987

TRACY RAY VAUGHN,

Plaintiff,

v.

JAMES D. RICKETTS, et al.,

Defendants.

No. CIV 84-624 PHX-CAM

United States District Court,
D. Arizona.

May 29, 1987.

ORDER

MUECKE, District Judge.

Having considered the Defendants' Motion for Summary Judgment, filed November 20, 1986, the Plaintiff's Response, filed February 18, 1987, and the Defendants' Reply, filed March 13, 1987, this Court hereby finds and concludes as follows:

FACTS

This action concerns the constitu-

tional implications raised by a series of digital rectal cavity searches conducted by prison authorities at the Arizona State Prison at Florence. Approximately eighty residents of the maximum security unit at the prison were subjected to the searches. The searches were conducted on the 15th, 22nd and 23rd of March in 1984. The prisoners subjected to the searches subsequently filed suits alleging deprivation of their rights under the fourth, eighth and fourteenth amendments of the United States Constitution pursuant to 42 U.S.C. Section 1983.[1] In their Motion for Summary Judgment, the Defendants argue that they are currently immune from any suit arising from the

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1. The individual actions have been consolidated into the above captioned case.

searches because the law governing body cavity searches of prisoners was not clearly established at the time of the searches. Since the issue presented in the Defendants' Motion is purely a question of law, there is presently no need to delve into the factual particularities involved in the case.[2]

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2. In a slightly different context, the Supreme Court recently noted that when a court is presented with a claim of qualified immunity, "[a]ll it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions...." Hence, at this juncture, this Court will accept the Plaintiffs' alleged facts as true and ascertain whether Defendants' alleged conduct may have violated any rights that were clearly established at the time of the contested conduct. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985). The Defendants' Reply Memorandum argues that even if the Plaintiffs' rights were clearly established at the time of the search, certain Defendants who did not actually participate in the (continued)

ANALYSIS

Prison officials enjoy a qualified immunity from liability arising from their official conduct, unless such conduct is in violation of a clearly established law of which the officials were reasonably aware.[3] *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978).

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2. (cont.) searches are nonetheless not liable because the doctrine of *respondeat superior* is not applicable to claims arising under 42 U.S.C. § 1983. *See Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). However, since this argument was not presented initially in their Motion for Summary Judgment and is extraneous to the question of qualified immunity, the Court will not presently consider this contention.

3. The burden of overcoming an official's qualified immunity by demonstrating the existence of a clearly established right rests with the plaintiff. *Davis v. Scherer*, 468 U.S. 183, 197, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139 (1984).

As the United States Supreme Court stated in *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818, 102 S.Ct. 2727, 2737-38, 73 L.Ed.2d 396 (1982), "government officials performing discretionary functions are shielded in their liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See also Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139 (1984). Accordingly, the Defendants argue that since there were no clearly established standards governing the search of prisoners at the time the searches presently at issue were conducted, they are immune from any suit resulting from the searches.

The Plaintiffs have challenged the

constitutionality of the searches at their inception and the manner in which the searches were actually conducted. Each issue will be examined in turn.

A. The Right to Search

The Defendants argue that neither the Ninth Circuit nor the United States Supreme Court "has ever declared . . . that probable cause or any lesser degree of cause is a constitutionally required predicate" for digital cavity searches.[4] Perusal of the case law in this area, however, indicates the contrary. For example, in *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), pretrial detainees challenged the constitutionality of visual body cavity

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4. The Defendants are under the impression that in order for a right to be "clearly established," there (continued)

searches on fourth amendment grounds.[5] In upholding the constitutionality of the searches, the Supreme Court explicitly limited its holding to the question of whether visual cavity searches could be "*ever* be conducted on less than probable cause." *Id.* at 560, 99 S.Ct. at 1885

. . .

. . .

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4. (cont.) must be "a case on point setting forth the precise constitutional right at issue." *Defendants' Reply Memorandum* at p. 4-6. However, there is no "case on point setting forth" this standard as to what actually constitutes "clearly established." To the contrary, it has been specifically held that direct precedent is not required to demonstrate a clearly established right. *See Lynch v. Cannatella*, 810 F.2d 1363, 1375 (CA5 1987).

5. The fourteenth amendment prohibits States from violating a citizen's fourth amendment rights. *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

(emphasis in the original).[6] Thus, while the Supreme Court ruled that visual body cavity searches can sometimes be conducted on less than probable cause, it is clear from the opinion that prison official require *some* measure of cause to conduct such searches. As the Court stated in *Bell*, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . . Courts must

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6. By emphasizing the word "ever," the Supreme Court obviously suggested that in some cases probable cause would be required to conduct even a visual body cavity search. In this regard, it should be noted that the searches in *Bell* were only conducted after contact visits. Thus, the natural implication is that probable cause would be required if the detainee had no recent outside contact. While the searches in the present case did not follow contact visits, this Court does not conclude that probable cause was required to conduct the searches because the Plaintiffs are not mere pretrial detainees.

consider the scope of the particular intrusion . . . [and] the justification for initiating it." *Id.* at 559, 99 S.Ct. at 1884. Such a statement would be superfluous if, as the Defendants contend, body cavity searches could be conducted without any reason whatsoever. Hence, at the very minimum, prison official must have reasonable cause to conduct digital body cavity searches.

Moreover, and most significantly, the *Bell* court repeatedly emphasized that the searches were entirely *visual* and involved *no* touching. In the words of the Court:

> If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates are also visually inspected. The inmate is not touched by security personal at

> any time during the *visual* search procedure.

Id. note 39, 558, 99 S.Ct. at 1884 n. 39 (emphasis in the original).

Accordingly, if prison official needed some cause, albeit less than probable cause, to conduct a visual body cavity search, it necessarily follows that such officials would also need at least some cause to conduct an exceedingly more intrusive digital body cavity search.

Ward v. San Diego County, 791 F.2d 1329 (CA9 1986), is also instructive. In *Ward*, the court rejected the defendant's qualified immunity defense and held that a 1981 visual body cavity search of a misdemeanor arrestee conducted in the absence of a reasonable grounds was a violation of clearly established fourth amendment rights. Although *Ward* involved

merely a misdemeanor arrestee, in contrast to a prison inmate, the search was also merely a visual inspection. In the present case, while those searched were subjected to a much more severe form of incarceration, they were also subjected to a much more severe form of search. Thus, it follows that the same standard of "reasonable grounds" applies.[7]

Accordingly, it is apparent that the decisions of both the United States Supreme Court and the Ninth Circuit clearly established prior to March of 1984 that prison officials needed reasonable grounds to initiate digital body cavity

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7. This reasoning, of course, is equally applicable to the pretrial detainees in *Bell* and the prisoners in the present controversy.

searches of prisoners.[8]

B. The Manner of Search

The Plaintiffs also argue that even if the law was unclear as to what standard, if any, governed prison officials' right to initiate the searches, the standards governing the manner in which the searches were actually conducted were clearly established. The Plaintiffs adduce *Bell v. Wolfish*, 441 U.S. at 560, 99 S.Ct. at 1885, in support of their argument. In *Bell*, the Court stated

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8. Of course, as already stated, the question of whether the Defendants actually possessed reasonable grounds to search the Plaintiffs is one of fact and is consequently beyond the scope of this Order. The Court will note, however, that the Plaintiffs are incorrect in interpreting the July 1, 1986 Order of this Court to hold that this Court will not consider the information provided to the Defendants by their informant. In determining the reasonableness of the searches, the informant's information will be appraised *in camera*.

"[n]or do we doubt . . . that on occasion a security guard may conduct the search in an abusive fashion. Such an abuse cannot be condoned. The searches must be conducted in a reasonable manner." [Citations omitted.] Obviously, this conclusion is underscored when such searches are digital rather than merely visual. Thus, the unequivocal language of the Supreme Court plainly established prior to searches presently at issue that rectal cavity searches must be reasonably conducted in order to withstand fourth amendment scrutiny.

Moreover, the manner in which the Plaintiffs were searched may have violated clearly established standards of the eighth and fourteenth amendments. For instance, in *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S.Ct. 285, 291, 50 L.Ed.2d 251

(1976), the Supreme Court ruled "that deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."[9] Since the searches involve a potentially adverse health impact, the Plaintffs argue their "serious medical needs" have been implicated.[10] The

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9. The eighth amendment is made applicable to the States by the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

10. Even aside from the medical implications of the searches, prison officials are also prohibited by the eighth amendment from exhibiting a "deliberate indifference" to the welfare of prisoners. *E.g. Hopowit v. Ray*, 682 F.2d 1237, 1250 (CA9 1982) (deliberate indifference to the "safety needs" of prisoners violated the eighth amendment); *Rhodes v. Chapman*, 452 U.S. 337 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981) (grossly inadequate conditions of confinement violate the eighth amendment); *Wright v. Wagner*, 641 F.2d 239, (continued)

Defendants allegedly conducted the searches without initially inquiring whether the searches posed a threat to the health concerns of the particular Plaintiffs. Moreover, the searches were allegedly conducted in an unsanitary, public area by personnel untrained in administering involuntary digital rectal examinations. The Plaintiffs also contend that the examiners failed to even wear gloves on both hands during the searches. Nor did they wash their hands after each examination or permit the Plaintiffs to wash themselves upon being searched. In light of the increasing danger of communicable diseases in prisons, the

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10. (cont.) 241-42 (CA5 1981) (deliberately indifferent failure to place a self-destructive inmate in padded cell would violate the eighth amendment).

allegedly unsanitary nature of the searches acquires special significance. Obviously, if proved, these allegations might constitute a deliberate indifference to the medical needs of the Plaintiffs and hence establish violations of the Plaintiffs' clearly established eighth amendment rights.[11]

In a similar vein, the fourteenth amendment forbids prison officials from treating inmates in a fashion so "brutal" or "offensive to human dignity" so as to

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11. While the Defendants are correct in stating that the eighth amendment's "unnecessary and unwanton" standard creates an "onerous burden for the plaintiff to meet" in the context of a prison disturbance, *see Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 1089, 89 L.Ed.2d 251 (1986) (Marshall J. dissenting), even assuming a *Whitley* type disturbance existed in the present case, this consideration is irrelevant for purposes of determining whether a qualified immunity applies.

"shock the conscience." *Meredith v. Arizona*, 523 F.2d 481, 483 (1975). While this test is very fact specific in application, the standard itself was well established far in advance of the searches in question. *See Rochin v. California*, 342 U.S. 165, 174, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952). Thus, the Defendants were obliged to conduct the searches in a manner that was not brutal, offensive to human dignity, or otherwise shocking to the conscience. The question of whether the Plaintiffs can actually substantiate that the Defendants violated this (or any other) obligation is reserved for a future determination.

CONCLUSION

Based on the foregoing, this Court concludes that the Plaintiffs have demon-

strated the existence of clearly established laws prohibiting the Defendants' alleged conduct. Consequently, the Defendants' claim of qualified immunity fails and their Motion for Summary Judgment on that ground is denied.

APPENDIX C

Testimony From the Depositions of
Dr. James D. Ricketts
and James D. Morgan

A. He indicated that he had information, credible information, from Florence that there was a serious problem in Cell Block 6, and I believe it was the facility administrator that had called, but his calls sometimes came from the intelligence officers or the inspectors, investigators down there.

Anyway, he had some, what he felt, was valid information that there was a serious security problem which apparently was given to the staff by informants in Cell Block 6, inmate informants. He indicated to me that there were explosives or there were supposed to be explosives in Cell Block 6.

Deposition of Dr. James G. Ricketts, p.17, lines 1-14.

A. Let me ask a question to clarify it. Did I call together a group of people to discuss that problem or that issues?

Q. Yes.

A. No, it was no time for a staff meeting or committee meeting. We had a facility was in danger, from my perspective, of being blown up. We needed some immediate action.

Deposition of Dr. James G. Ricketts, p.28, lines 4-11.

A. Places I've been. What would I do if I had to do it over? No, I would do exactly what we did. If I had it -- after two lawsuits and two depositions and countless number of hours, I would do identically the same thing I did that day. I would make the same decision.

Q. Well, Dr. Ricketts, that really wasn't my question. What I was going to ask was, would you ordinarily give an inmate an opportunity to select an alternative to a digital rectal cavity search?

A. Would I ordinarily do that?

Q. Uh-huh.

A. In a situation where there was, what we felt like, was a life threatening situation, we felt like we

didn't know what kind of contraband, we don't know that it wasn't blasting explosives, I don't think so. I don't think I would have, in that situation, give that option.

I guess it's for someone else to determine whether it would have been wiser to do that. You're asking me whether I considered, whether I -- I don't know.

Deposition of Dr. James G. Ricketts, p.43, lines 3-24.

Q. And then you have another conversation sometime between the 15th and the second set of searches, which you were not real sure -- you're not real sure about, but you have another conversation that there's ongoing problems; is that accurate?

A. Yeah, that there was still contraband in that cell block.

Q. And the nature of the contraband, you discussed the nature of the contraband?

A. Oh, yes.

Q. And it was still of a dangerous nature?

A. Oh, yes, that's the reason why the original search was conducted, because of the danger. If it was other types of contraband, you know,

we would have not done a rectal search.

Q. And then -- and so you must have -- did you advise Mr. Bramlett to carry on with the seond set of searches then?

A. Yeah, I indicated that we'd be negligent if we didn't do something if we have information from similar sources as the first time. We need to make certain that we try to get the contraband out of the cell block.

Q. And the searches were performed then?

A. Searches were performed.

Deposition of Dr. James G. Ricketts, p.90, lines 1-25.

Q. Did you think about limiting the searches to those inmates with whom Mr. Bramlett had information?

A. No, I did not have that kind of conversation with him, but the normal procedure would be to -- you know, we were conducting a search in an area that we were advised that there was contraband in that cell block area, it was Cell Block 6, and that it could be in any area because inmates moved in and out to go to court, to have visits.

I think at that time we were still having contact visits, and there was -- there was no reason to restrict and say that we will not search anybody in a certain area. It would have almost been counterproductive to have done that at that time.

Deposition of Dr. James G. Ricketts, p.94, lines 9-22.

Deposition of Dr. James G. Richards, p.94, lines 7-22.

Q. You believed it to be legal?

A. Totally legal. If I had a doubt whatsoever, I wouldn't have done it.

Q. What would have made it illegal? I'm sorry, what would have made the searches illegal?

A. I don't know. If there had been case law that indicated that this was violating someone's constitutional right to do that, I wouldn't have done it.

Q. You weren't aware of any case law?

A. That indicated that it was violating their constitutional -- no, and I'm still not.

Deposition of Dr. James G. Ricketts, p.96, lines 1-12.

Q. Do you recall what was found on the 15th?

A. About 19 ounces of gun powder and 12 or 13 inches of black fuse and a couple of blasting caps and a hype kit.

Deposition of James D. Morgan, p.60, lines 18-21.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1345

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JAMES D. RICKETTS, ET AL.,

Petitioners,

vs.

TRACY RAY VAUGHAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Whether the District Court and Court of Appeals correctly held that reasonable prison officials in the position of the petitioners should have known that subjecting inmates to grossly and unnecessarily abusive digital rectal cavity searches by inadequately trained personnel, in open prison hallways, with no inquiry into potential medical hazards, and without any meaningful effort to maintain sanitary conditions, would violate clearly established eighth and fourteenth amendment standards.

2. Whether the District Court and Court of Appeals correctly held that the manner in which the digital rectal cavity searches described in the preceding question were conducted violated clearly established fourth amendment standards.

3. Whether this Court should grant certiorari to consider abstract interlocutory questions concerning the applicability of the Fourth Amendment to searches of the rectal cavities of prison inmates when the District Court and Court of Appeals were correct in rejecting the petitioners' defense of qualified immunity to the respondents' eighth and fourteenth amendment claims, with the result that the petitioners must stand trial on those claims, involving the same material facts, in any event.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	8
I. Introduction	8
II. The Court of Appeals was Correct in Holding That the Grossly and Unncessarily Abusive Manner in Which the Digital Rectal Cavity Searches were Conducted in This Case Violated Clearly Established Eighth Amendment Standards.	10
III. The Court of Appeals Correctly Held That the Petitioners' Conduct Violated Clearly Established Fourteenth Amendment Standards.	12
IV. The Court of Appeals' Rejection of the Petitioners' Defense of Qualified Immunity to the Respondents' Fourth Amendment Claims was Correct, and Provides No Basis for Granting Certiorari.	14
V. This is not an Appropriate Case for a Massive Expansion of Parratt v. Taylor That Would Effectively Eliminate Virtually all Federal Civil Rights Actions.	17
CONCLUSION	19
APPENDIX D	1d

TABLE OF AUTHORITIES

Cases — Page

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 2

Allison v. Wilson,
434 F.2d 646 (9th Cir. 1970) 13

Anderson v. Creighton,
___ U.S. ___, 107 S.Ct. 3034 (1987) 2,5,9,10

Bell v. Wolfish,
441 U.S. 529 (1979) 15

Birkenholz v. Sluyter,
857 F.2d 1214 (8th Cir. 1988) 18

Bonitz v. Fair,
804 F.2d 164 (1st Cir. 1986) 16,17

Breault v. Chairman of the Bd. of Fire Comm'rs.,
513 N.E.2d 1277 (Mass. Sup. Jud. Ct. 1987),
cert. denied, 108 S.Ct. 1078 (1988) 19

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 17

Estelle v. Gamble,
429 U.S. 97 (1976) 10,18

Gaut v. Sunn,
792 F.2d 874 (9th Cir. 1986) 11

Gillespie v. Civiletti,
629 F.2d 637 (9th Cir. 1980) 12

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 9,15

Hodges v. Stanley,
712 F.2d 34 (2d Cir. 1983) 16

Hoptowit v. Ray,
682 F.2d 1237 (9th Cir. 1982) 10,11,12

Hudson v. Palmer,
468 U.S. 517 (1984) 16,18

Hurley v. Ward,
584 F.2d 609 (2d Cir. 1978) 16

Lanza v. New York,
370 U.S. 139 (1962) 15

L.J. v. Massinga,
838 F.2d 118 (4th Cir. 1987), cert. denied,
108 S.Ct. 2867 (1988) 19

Page

Cases

Logan v. Shealy,
660 F.2d 1007 (4th Cir. 1981) 16,18

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 18

McRorie v. Shimoda,
795 F.2d 780 (9th Cir. 1986) 11

Meredith v. Arizona,
523 F.2d 481 (9th Cir. 1975) 11,13

Mitchell v. Forsyth,
472 U.S. 511 (1985) 9,17

Monroe v. Pape,
365 U.S. 167 (1961) 18

Parratt v. Taylor,
457 U.S. 521 (1981) 7,17,18

Rochin v. California,
342 U.S. 165 (1952) 13

Rutledge v. Board of Regents,
660 F.2d 1345 (9th Cir. 1981) 12

Stroud v. United States,
251 U.S. 15 (1919) 16

Stubbs v. Dudley,
849 F.2d 83 (2d Cir. 1988), cert. denied,
57 U.S.L.W. 3546 (1989) 19

Turner v. Safley,
____ U.S. ____, 107 S.Ct. 2254 (1987) 8

United States v. Savage,
482 F.2d 1371 (9th Cir. 1973) 16

Vaughan v. Ricketts,
663 F.Supp. 401 (D.Ariz. 1987) . . . . . passim

Vaughan v. Ricketts,
859 F.2d 736 (9th Cir. 1988) . . . . . passim

Whitley v. Albers,
475 U.S. 312 (1986) 6,10,11,13

Wilson v. Beebe,
770 F.2d 578 (9th Cir. 1986) 18

Wilson v. Lane,
851 F.2d 867 (7th Cir. 1988), cert. denied,
57 U.S.L.W. 3487 (1989). 19

Cases	Page
Wiltsie v. Cal. Dep't. of Corrections, 406 F.2d 515 (9th Cir. 1968)	13
Wrigley v. Greanias, 842 F.2d 955 (7th Cir. 1988), cert. denied, 57 U.S.L.W. 3148 (1989)	19

Constitutional Provisions and Statutes

U.S. CONSTITUTION, AMENDMENT IV	1,5,6,9
U.S. CONSTITUTION, AMENDMENT III.	1,5,9,10-12
U.S. CONSTITUTION, AMENDMENT XIV.	1,5,7,9,12-13
42 U.S.C. § 1983	1,14-18

STATEMENT OF THE CASE

A. Procedural History

This case involves several consolidated actions brought under 42 U.S.C. § 1983. The plaintiffs/respondents, inmates at the Arizona State Prison at Florence, Arizona, alleged that the defendants/petitioners, officials of the Arizona Department of Corrections, violated their clearly established rights under the Fourth, Eighth, and Fourteenth Amendments when, without adequate cause, they subjected the respondents to digital rectal cavity searches in a grossly and unnecessarily abusive manner.

After extensive discovery had been completed, the petitioners filed a motion for summary judgment in the District Court on the ground that they were entitled to qualified immunity. The District Court denied this motion. Vaughan v. Ricketts, 663 F.Supp. 401, 405 (D. Ariz. 1987) (Pet. at 29a-30a).

The petitioners appealed to the United States Court of Appeals for the Ninth Circuit. Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988) (Pet. App. A). The Court of Appeals affirmed the District Court's ruling that the petitioners were not entitled to summary judgment on the basis of qualified immunity, holding that no reasonable prison official could have believed that the searches were conducted in a constitutionally permissible manner under then clearly established fourth, eighth, and fourteenth amendment standards. Id. at 742 (Pet. at 12a). The Court of Appeals further held that it was unnecessary to decide whether the petitioners had sufficient justification for the searches. Id. at 740 (Pet. at 7a).

The Petition for a Writ of Certiorari seeks further interlocutory review of the judgment of the Court of Appeals.

B. Facts.

The Petition for a Writ of Certiorari studiously avoids any meaningful discussion of the facts on the basis of which the courts below rejected the petitioner's claim of qualified immunity. However, as this Court made clear in Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 3038-39 (1987), a motion for summary judgment on qualified immunity grounds must be decided with reference to the defendants' particular conduct. Because this action involves a motion for summary judgment by the defendants/petitioners, the facts must be viewed in the light most favorable to the plaintiffs/ respondents, based on the depositions, affidavits, and other evidentiary materials submitted by the parties in connection with the motion for summary judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

On March 15, 1984, approximately 13 to 16 inmates in Celiblock 6 (hereafter "CB6") at the Arizona State Prison (hereafter "ASP"), including a number of the respondents, were subjected to a series of digital rectal cavity searches and other procedures by or at the direction of the petitioners. (SER 2-11).[1] Initially, digital rectal cavity searches were performed at a table in a hallway of CB6, in full view of a number of correctional personnel and some inmates. (SER 2-5). Neither the hallway nor the table was cleaned in any way before or during the searches, and the Correctional Medical Assistants (hereafter "CMA's") who performed the searches did not wash their hands between searches. (SER 3-4). The CMA's had no experience or

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[1] "SER" refers to the Supplemental Excerpts of Record filed in the Court of Appeals, consisting primarily of Plaintiffs' [Local] Rule 11(i) Statement of Facts, which was filed in the District Court in connection with the petitioners' motion for summary judgment. The Rule 11(i) Statement of Facts, which sets out the facts in some detail, is appended hereto as Appendix D, and is paginated to correspond with the SER page references in this Brief in Opposition.

training in performing involuntary rectal cavity searches, and they had received no instructions on how to conduct them. (SER 6).

The inmates did not have any choice about whether they would be searched rectally, and they were not offered any less intrusive alternatives such as X-rays or voluntary surrender of contraband. (SER 3, 5). The petitioners did not conduct any visual rectal cavity searches prior to the digital rectal cavity searches. (SER 5). The petitioners also made no effort to ascertain, from the inmates or from their medical records, whether any inmates had medical conditions that would make digital rectal cavity probes medically inappropriate. (SER 5-6).

During each search, a CMA inserted a finger into the inmate's rectal cavity and probed for foreign material. (SER 4). Inmates who indicated any resistance to the rectal cavity searches, verbally or otherwise, were physically forced to submit. (SER 3). All inmates were physically restrained by Correctional Service Officers (hereafter "CSO's") even if they did not resist. (Id.) During the search procedures, ASP employees joked, laughed, and made insulting comments. (SER 5). The inmates were not given an opportunity to clean themselves after they were searched. (SER 4).

After the initial digital rectal cavity searches in CB6 on March 15, 1984, several of the inmates were taken to the ASP Central Health Unit, where they were subjected to further digital rectal cavity searches and X-rays (by non-licensed personnel), all without their consent. (SER 9). At least one respondent, inmate Frank Palmer, was subjected to a continuing series of painful rectal probes by a female doctor. (SER 9). After an initial digital rectal cavity search, the doctor inserted a sigmoidoscope into Palmer's rectum. Palmer then was searched

digitally twice more. (Id.) Finally, a metal "clamp" and two fingers were inserted into Palmer's rectum. Although the doctor noticed bleeding in Palmer's rectum during the probe, she did not provide or arrange for any follow-up treatment. (SER 10). Palmer was not asked to consent to any of these procedures. (SER 9).

In the opinion of a petitioner/CMA and a petitioner/ prison doctor, various aspects of the manner and circumstances of the search procedures were not medically appropriate. (SER 5-7, 9-10).

On March 22 and 23, 1984, the petitioners subjected a much larger group of CB6 inmates to digital rectal cavity searches under essentially the same conditions and in essentially the same manner as the searches in CB6 on March 15. (SER 11-14). The inmates who already had been searched on March 15 were included in the group of inmates who were searched on March 22 and 23, even though they had been placed in isolation cells, without their property and without any opportunity for contact visits with outsiders, between March 15 and March 22. (SER 11, 14).

Prior to March 15, 1984, the petitioners had never conducted any digital rectal cavity searches for security purposes. (Id.) The petitioners also have not conducted any such searches since April of 1984. (Id.)

SUMMARY OF THE ARGUMENT

1. There is no dispute in this case that the constitutional rights of prisoners are limited by valid penological objectives such as institutional security, or that the judgments of prison officials regarding institutional security are entitled to substantial judicial deference. However, prison inmates do retain some constitutional rights, and the grossly and unnecessarily abusive manner in which the digital rectal cavity searches at issue in this case were conducted was wholly unrelated to any conceivable interest in institutional security.

2. The petitioners seek further interlocutory review of the District Court's and Court of Appeals' denial of their motion for summary judgment on qualified immunity grounds. Consequently, the central question is whether reasonable prison officials in the position of the petitioners should have understood that the egregious manner in which the digital rectal cavity searches were conducted -- as shown by the record before the District Court -- violated the respondents' then-established fourth, eighth, and fourteenth amendment rights. Anderson v. Creighton, ___ U.S. ___, 107 S.Ct 3034 (1987).

3. The Court of Appeals correctly found that as of March 1984, it was clearly established that the Eighth Amendment prohibited the "unnecessary and wanton infliction of pain" and "deliberate indifference" to the health and safety of prison inmates. The Court of Appeals also correctly held that no reasonable prison official could have failed to realize that the unnecessarily abusive digital rectal cavity searches in this case violated those eighth amendment standards.

4. The Court of Appeals correctly held that the digital rectal cavity searches in this case were conducted in a fashion

that was so "brutal" and "offensive to human dignity" as to "shock the conscience"; that they were "maliciously and sadistically applied for the purpose of causing harm"; and that they therefore violated clearly established fourteenth amendment standards of which the petitioners should have been aware. The petitioners' only response to this holding -- that this Court's decision in Whitley v. Albers, 475 U.S. 312 (1986), indicates that the test for a fourteenth amendment due process violation in the prison context is the same as the test for a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause -- provides no basis for granting certiorari in this case, since the Court of Appeals' rejection of the petitioners' qualified immunity defense to the respondents' eighth amendment claims plainly was correct.

5. The Court of Appeals correctly held that no reasonable prison official could have believed that the digital rectal cavity searches in this case were conducted in a reasonable, non-abusive manner, and that those searches therefore violated fourth amendment standards that were clearly established in March 1984. The petitioners' argument -- which is not that the digital rectal cavity searches in question were conducted in a reasonable manner, but rather that prison inmates have absolutely no fourth amendment rights, even with respect to highly intrusive manual searches of their body cavities -- is not supported by the decisions of this Court or any federal circuit court. Moreover, granting certiorari to review abstract questions of the applicability of the Fourth Amendment to searches of prison inmates' body cavities would not be appropriate in the interlocutory context of this case, since the petitioners must stand trial on the respondents' eighth and fourteenth amendment claims -- which involve the same factual issues as the respondents' fourth amendment claims -- in any event.

6. The petitioners' argument that Parratt v. Taylor, 457 U.S. 521 (1981), should be extended to deprive the federal courts of their jurisdiction over essentially all federal constitutional claims is inconsistent with the rationale of Parratt -- which is limited to fourteenth amendment procedural due process claims -- and is unsupported by any decision of this Court or the circuit courts of appeals.

7. The petitioners have failed to show that the judgment of the Court of Appeals conflicts with any decision of this Court or another circuit court, or that there is any other reason for this Court to grant further interlocutory review of the denial of the petitioners' motion for summary judgment on qualified immunity grounds. The Petition for a Writ of Certiorari therefore should be denied.

ARGUMENT

I. INTRODUCTION

Approximately one-third of the Argument section of the Petition for a Writ of Certiorari (pp. 8-21) is devoted to the development of two related propositions: that the constitutional rights of incarcerated felons are limited by such valid penological objectives as deterrence, rehabilitation, and institutional security; and that the judgments of prison officials on matters of institutional security are entitled to considerable judicial deference. These are propositions with which the respondents do not quarrel, and with which the decision of the Court of Appeals is not inconsistent. At the same time, however, it is clear from decisions of this Court which the petitioners themselves cite (Pet. at 9-10) that prison inmates are not wholly without constitutional rights, and that "institutional security" is not a shibboleth the mere invocation of which automatically vitiates those rights. See, e.g., Turner v. Safley, ___ U.S. ___, 107 S.Ct. 2254, 2265-66 (1987).

In this case, the egregious conduct of the petitioners, as demonstrated by the record before the Court of Appeals, constituted violations of "clearly established" constitutional rights that could not possibly be justified by reference to institutional security. Certainly there was no legitimate reason, in terms of institutional security or otherwise, why the digital rectal cavity searches in question had to take place in unsanitary hallways; why the searchers were inadequately trained, or why they could not observe proper hygienic procedures; why the searches had to be visible to numerous institutional employees or other inmates; why the inmates had to be subjected to verbal abuse; why the defendants made no efforts to ascertain whether

digital rectal cavity searches would pose medical risks to any of the inmates; why inmates were subjected to further rectal cavity searches even after they had defecated; or why any inmate was subjected to a rectal cavity probe with a metal clamp that caused bleeding that was not attended to.

The Petition for a Writ of Certiorari also devotes a considerable amount of space to developing the standards that this Court has articulated for adjudicating claims of qualified immunity. (Pet. at 21-27). Again, the respondents have no quarrel with these standards. In the summary judgment context, the basic question is whether the respondents have produced sufficient evidence to support their claims that the petitioners violated "clearly established" constitutional rights. Mitchell v. Forsyth, 472 U.S. 511, 528, n. 9 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The answer to this question depends on whether a "reasonable official" would have understood that his particular conduct violated the rights being claimed. Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 3038 (1987).[2] As the succeeding paragraphs will show, any reasonable prison official in the position of the petitioners should have understood that the manner in which the digital rectal cavity searches were conducted in this case violated the respondents' then-established fourth, eighth, and fourteenth amendment rights.

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[2] "This is not to say that an official action is protected unless the very action in question has previously been held unlawful . . . , but it is to say that in the light of preexisting law the unlawfulness must be apparent." Id. at 3038-3039.

II. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE GROSSLY AND UNNECESSARILY ABUSIVE MANNER IN WHICH THE DIGITAL RECTAL CAVITY SEARCHES WERE CONDUCTED IN THIS CASE VIOLATED CLEARLY ESTABLISHED EIGHTH AMENDMENT STANDARDS.

A. The Court of Appeals began its analysis of the petitioners' assertion of qualified immunity from the respondents' eighth amendment claims by finding that it was clearly established in March 1984 that prison officials' "deliberate indifference" to inmates' serious medical and safety needs consituted the "unnecessary and wanton infliction of pain" that the Cruel and Unusual Punishments Clause prohibits. 859 F.2d at 741 (Pet. at 9a-10a) (citing Estelle v. Gamble, 429 U.S. 97, 105 (1976), and Hoptowit v. Ray, 682 F.2d 1237, 1249-50 (9th Cir. 1982)). Noting that the petitioners did not dispute the existence of clearly established eighth amendment standards, the Court of Appeals then followed this Court's directive in Anderson v. Creighton, supra, 107 S.Ct. at 3038-39, and turned to an examination of the petitioners' specific conduct. On the record before it, the Court of Appeals concluded that the searches in question constituted "an unnecessary use of force showing a wanton disregard for the health and safety of the inmates," and that "a reasonable official would understand, under law clearly established in 1984, that the conditions and manner under which . . . the searches were conducted constituted deliberate indifference to the inmates' medical and safety needs." 859 F.2d at 741, 742 (Pet. at 10a, 11a).

B. In this Court, the petitioners' primary complaint about the Court of Appeals' eighth amendment holding is that the court relied on the "deliberate indifference to serious medical needs" standard from Estelle v. Gamble, supra, rather than the "unnecessary and wanton infliction of pain" standard from Whitley

v. Albers, 475 U.S. 312 (1986). (Pet. at 37-38). This complaint is without merit, for several reasons:

1. The Court of Appeals explicitly recognized that the "deliberate indifference" standard was derived from the "unnecessary and wanton infliction of pain" standard -- and found that the search procedures in question were "maliciously and sadistically applied for the purpose of causing harm." 859 F.2d at 741, 742 (Pet. at 9a-10a, 12a).

2. The Court of Appeals referred not only to deliberate indifference to the inmates' medical needs, but also to deliberate indifference to the inmates' safety needs, relying on its own pre-1984 decision in Hoptowit v. Ray, supra. 859 F.2d at 741 (Pet. at 10a, 11a).

3. Given the nature of the "searches" at issue in this case, and the petitioners' failure to provide minimal sanitation or check on the inmates' medical conditions, the petitioners' conduct plainly did implicate the inmates' serious medical needs.

4. In any event, the proper resolution of this case does not depend on whether one applies the "deliberate indifference" standard or the "unnecessary and wanton infliction of pain" standard: No reasonable prison official could have believed that the manner in which the digital rectal cavity searches in this case were conducted was consistent with either standard.

C. The petitioners seem to suggest that their conduct was permissible because other eighth amendment cases assertedly have involved even more egregious conduct. (Pet. at 40-41, citing Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975), Gaut v. Sunn, 792 F.2d 874 (9th Cir. 1986), and McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986)). Quite apart from whether the petitioners' characterization of the comparative egregiousness of these cases is correct, however, the fact that certain conduct has been held to violate the eighth amendment does not imply that any and all

less egregious conduct is constitutional, or that any reasonable prison official would think so. Moreover, the petitioners simply ignore other, pre-1984 Ninth Circuit decisions holding that significantly less offensive conduct violated eighth amendment standards. See Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982) (brutal behavior toward inmates, including arbitrary shakedowns and theft and destruction of property); Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980) (denial of health needs, failure to protect from inmate attacks, and placement in cold cell).[3]

D. Because the petitioners could not reasonably have believed that the respondents were searched in a manner consistent with then-established eighth amendment standards, their claim of qualified immunity properly was rejected by the courts below. This alone is sufficient to warrant the denial of the Petition for a Writ of Certiorari in this interlocutory context -- since even if the petitioners were entitled to qualified immunity on the respondents' fourth and fourteenth amendment claims, they still would have to stand trial on the eighth amendment claims.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE PETITIONERS' CONDUCT VIOLATED CLEARLY ESTABLISHED FOURTEENTH AMENDMENT STANDARDS.

A. In rejecting the petitioners' defense of qualified immunity with respect to the respondents' fourteenth amendment claims, the Court of Appeals began by noting that it was clearly established in March 1984 that the Due Process Clause prohibited treatment that was so "brutal" or "offensive to human dignity" as to "shock the conscience." 859 F.2d at 742 (Pet. at 11a) (citing

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[3] The petitioners' citation of Rutledge v. Board of Regents, 660 F.2d 1345 (9th Cir. 1981) (Pet. at 41), is completely inapposite, since that case did not even mention the Eighth Amendment -- perhaps because the plaintiff, who simply alleged that his football coach had hit him once in the mouth, was not a prisoner.

Rochin v. California, 342 U.S. 165, 172, 174 (1952), and Meredith v. Arizona, 523 F.2d 481, 483 (9th Cir. 1975)). The Court of Appeals then held that a reasonable prison official would have known that the particular searches involved in this case "were conducted in a brutal fashion that was not justified by a need for force"; that "the extent of possible injury was great"; and that the record supported an inference that "the force was maliciously and sadistically applied." 859 F.2d at 742 (Pet. at 12a).

B. The petitioners' only real argument regarding the respondents' fourteenth amendment claims (Pet. at 36-37) is that they are not separable from the eighth amendment claims in light of this Court's indication in Whitley v. Albers, supra, that the Due Process Clause affords prisoners "no greater [substantive] protection than does the Cruel and Unusual Punishments Clause." 475 U.S. at 327. But this argument provides no reason for granting certiorari in this case -- since the Court of Appeals correctly rejected the petitioners' defense of qualified immunity to the respondents' eighth amendment claims.

C. At the same time, the fourteenth amendment issue, even if co-extensive with the eighth amendment issue, lends further support to the judgment of the Court of Appeals, since pre-1984 (and pre-Whitley) substantive due process precedents gave the petitioners additional notice that their conduct could not reasonably be regarded as consitutional. See, e.g., Rochin v. California, supra; Meredith v. Arizona, supra; Allison v. Wilson, 434 F.2d 646 (9th Cir. 1970); Wiltsie v. California Department of Corrections, 406 F.2d 515 (9th Cir. 1968).

IV. THE COURT OF APPEALS' REJECTION OF THE PETITIONERS' DEFENSE OF QUALIFIED IMMUNITY TO THE RESPONDENTS' FOURTH AMENDMENT CLAIMS WAS CORRECT, AND PROVIDES NO BASIS FOR GRANTING CERTIORARI.

A. The Court of Appeals rejected the petitioners' claim of qualified immunity not only on the respondents' eighth and fourteenth amendment claims, but also on their fourth amendment claims, holding (1) that the petitioners should have known that the abusive and unreasonable manner in which the digital rectal cavity searches were conducted violated clearly established fourth amendment standards, and (2) that it was unnecessary to decide whether the petitioners had sufficient cause to conduct even proper cavity searches. 859 F.2d at 740-41 (Pet. at 7a-9a).

B. With respect to the fourth amendment issue, the Petition for a Writ of Certiorari does not argue that the searches in question were reasonable or non-abusive. Rather, the petitioners rely exclusively on the argument that prisoners have no fourth amendment rights at all, even in their persons. The petitioners' position essentially is that this Court has given prison officials a "green light" to search inmates' body cavities for any (or no) reason and in any manner, no matter how abusive. (Pet. at 30-35). This expansive, abstract argument does not warrant the granting of certiorari in this case, for the following reasons:

1. Given the qualified immunity context of this case, there is no reason to consider the applicability of the Fourth Amendment to searches of prisoners' body cavities at the current interlocutory stage of the proceedings. Because the Court of Appeals was correct in rejecting the petitioners' qualified immunity defense with respect to the eighth and fourteenth amendment claims, the petitioners will have to stand trial on those claims -- which involve the same factual issues

as the fourth amendment claims --in any event. Consequently, in terms of the essential rationale for disposing of qualified immunity claims at the summary judgment stage -- protecting public officials from the burdens of litigating non-meritorious claims -- granting certiorari to review the fourth amendment issue would serve no purpose.[4] See Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

2. In any case, the petitioners' position that the Fourth Amendment does not apply to prisoners in any context whatsoever is simply without merit.

a. As the Court of Appeals recognized, 859 F.2d at 739 (Pet. at 7a), this Court clearly indicated in Bell v. Wolfish, 441 U.S. 529, 558 (1979), that even visual rectal cavity searches must be conducted in a reasonable, non-abusive manner. While Bell held that inmates could be subjected to visual cavity searches on "less than probable cause," this Court was careful to limit the manner in which such searches could be carried out:

> Nor do we doubt . . . that on occasion a security guard may conduct a search in an abusive fashion. . . . Such an abuse cannot be condoned. The searches must be conducted in a reasonable manner.

Id. Obviously, if visual rectal cavity searches must be carried out in a reasonable, non-abusive manner, so must more intrusive digital rectal cavity searches. Moreover, it is clear from the context of the Bell opinion that its limitation of rectal cavity searches to those that are reasonable and non-abusive was derived from the Fourth Amendment. Id.

b. Contrary to the petitioners' assertions (Pet. at 31-32), the preceding conclusion is not inconsistent with the Bell opinion's citation to Lanza v. New York, 370 U.S. 139

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[4] With respect to the burdens associated with pre-trial procedures, the respondents would note that extensive discovery already has taken place, and that the District Court has set a deadline of March 24, 1988, for the completion of discovery.

(1962), and Stroud v. United States, 251 U.S. 15 (1919), or with this Court's decision in Hudson v. Palmer, 468 U.S. 517 (1984). Stroud simply held that the seizure of a prisoner's letter was not unreasonable under the Fourth Amendment; and Lanza merely suggested, in dictum, that a prisoner did not have a reasonable expectation of privacy in his prison cell. 370 U.S. at 143. Both cases were analyzed under the Fourth Amendment, and they suggest, if anything, that prisoners do have some fourth amendment rights. Hudson, like Lanza, dealt only with a prisoner's reasonable expectation of privacy in his cell, and does not speak at all to a prisoner's reasonable expectation of freedom from invasions of his body cavities -- especially invasions that are abusive and unreasonable.

c. The Court of Appeals' holding that the Fourth Amendment applies to searches of the persons of prisoners is supported by several other circuit court cases. See, e.g., Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986) (involving facts similar to those in this case); Hodges v. Stanley, 712 F.2d 34 (2d Cir. 1983); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981); Hurley v. Ward, 584 F.2d 609 (2d Cir. 1978); United States v. Savage, 482 F.2d 1371, 1372 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974). The petitioners cite no circuit court decisions to the contrary.

C. Addressing the "fact specific" question of whether the petitioners could have believed that the digital rectal cavity searches to which the respondents were subjected in March of 1984 were lawful "in light of clearly established law," the Court of Appeals concluded that no reasonable prison official could have believed that the manner of those searches was reasonable and non-abusive under the Fourth Amendment. 859 F.2d at 741 (Pet. at 9a). No other conclusion would have been

possible on the egregious record in this case, and the petitioners do not argue otherwise.[5]

V. THIS IS NOT AN APPROPRIATE CASE FOR A MASSIVE EXPANSION OF PARRATT V. TAYLOR THAT WOULD EFFECTIVELY ELIMINATE VIRTUALLY ALL FEDERAL CIVIL RIGHTS ACTIONS.

A. Ironically, the weakness of the petitioners' position in this case is illuminated by their final argument: that this Court should "extend" its decision in Parratt v. Taylor, 451 U.S. 527 (1981), to remove from the purview of the federal courts "all constitutional injuries cognizable under Section 1983 except those based upon an allegedly unconstitutional state law, policy, procedure, pattern, or practice." (Pet. at 43-44). This attempt to turn Parratt into what the petitioners characterize as a "magic wand" (Pet. at 45) is supported neither by the rationale of Parratt nor by any other decision of this Court or the circuit courts of appeals.

B. In Parratt, this Court held that a state prisoner who alleged that prison officials negligently had lost certain hobby materials valued at $23.50 had not stated a valid fourteenth amendment claim for deprivation of property "without

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[5] At two points in the Petition for a Writ of Certiorari, the petitioners briefly hint at an additional issue that is not included in their Question Presented: the individual liability of particular petitioners to particular respondents for particular incidents. (Pet. at 34, 39, n. 7). This issue, however, is not properly before this Court, for at least two reasons. First, the petitioners' Motion for Summary Judgment, asserting that its argument was "narrow and single-barreled," raised only one issue, namely the petitioners'collective qualified immunity from damages, and it made no mention of any issue of individual liability. (District Court Record Entry 216). Consequently, as the District Court noted, 663 F. Supp. at 402 (Pet. at 15a-15b), n. 2, the petitioner's Motion was insufficient to raise such an issue as a basis for granting summary judgment. Celotex Corporation v. Catrett, 477 U.S. 317 (1986). Second, under Mitchell v. Forsyth, 472 U.S. 511 (1985), a defendant may take an interlocutory appeal as of right only from a denial of summary judgment on qualified immunity grounds. Therefore, even if the individual liability issue had been properly presented to the District Court, it could not have been included in the petitioners' interlocutory appeal to the Court of Appeals. See also Bonitz v. Fair, 804 F.2d 164, 166-69 (1st Cir. 1986).

due process" -- because the state did provide "due process" through an adequate postdeprivation procedural remedy. 451 U.S. at 536-544. This Court was careful to note that the claims of the plaintiff in Parratt were brought under the Due Process Clause of the Fourteenth Amendment simpliciter, and consequently differed from claims involving violations of the Fourth Amendment or the Eighth Amendment. 451 U.S. at 536 (contrasting Monroe v. Pape, 365 U.S. 167 (1961), and Estelle v. Gamble, 429 U.S. 97 (1976)). Thus, Parratt was strictly limited to procedural due process claims.

C. This Court has applied the reasoning of Parratt to intentional deprivations of property, Hudson v. Palmer, 468 U.S. 517, 533 (1984); and some circuit court decisions have applied Parratt to alleged deprivations of liberty without procedural due process, see, e.g., Birkenholz v. Sluyter, 857 F.2d 1214, 1217 (8th Cir. 1988), and Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1986) (en banc). However, the petitioners have not cited, and the respondents are not aware of, any decisions of this Court or the circuit courts that have extended Parratt beyond the procedural due process context.[6] In fact, in Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982), this Court held that Parratt was inapplicable even to procedural due process challenges to deprivations of property under "established state procedures."

D. None of the respondents' claims in this case involve alleged violations of procedural due process. Consequently, Parratt v. Taylor provides no basis for granting the Petition for a Writ of Certiorari.

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[6] Page 44 of the Petition could be read to imply that Birkenholz v. Sluyter and Wilson v. Beebe, supra, applied Parratt to substantive, rather than procedural, due process claims. Any such implication, however, would be incorrect, as both Birkenholz and Wilson are procedural due process cases.

CONCLUSION

The petitioners have failed to show that the judgment of the Court of Appeals is inconsistent with any decision of this Court or another circuit court of appeals, or that there is any other basis for this Court to grant further interlocutory review of the denial of the petitioners' motion for summary judgment. There is no more reason to grant certiorari in this case than in the numerous other "qualified immunity" cases in which this Court has denied certiorari in recent years. See, e.g., Stubbs v. Dudley, 849 F.2d 83 (2d Cir. 1988), cert. denied, 57 U.S.L.W. 3546 (1989) (qualified immunity defense to eighth amendment claims); Wilson v. Lane, 851 F.2d 867 (7th Cir. 1988), cert. denied, 57 U.S.L.W. 3487 (1989); Wrigley v. Greanias, 842 F.2d 955 (7th Cir. 1988), cert. denied, 57 U.S.L.W. 3148 (1989); L.J. v. Massinga, 838 F.2d 118 (4th Cir. 1987), cert. denied, 108 S.Ct. 2867 (1988); Breault v. Chairman of the Board of Fire Commissioners, 513 N.E.2d 1277 (Mass. Sup. Jud. Ct. 1987), cert denied, sub nom. Forastiere v. Breault, 108 S.Ct. 1078 (1988). The Petition for a Writ of Certiorari therefore should be denied.

RESPECTFULLY SUBMITTED,

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APPENDIX D

Court of Appeals Supplemental Excerpts

of Record (pp. 1-15)

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FEB 19 1987

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TRACY RAY VAUGHAN, Plaintiff, vs. JAMES D. RICKETTS, et al., Defendants.	No. CIV 84-624 PHX CAM (MM) (Consolidated) PLAINTIFFS' RULE 11(4) STATEMENT OF FACTS

The following Statement of Facts is based on the accompanying evidentiary materials (Exhibits A - X), which include affidavits; DOC Policy #406; certain discovery responses by the defendants; and excerpts from depositions of certain defendants and other DOC employees. Exhibits A and B are Affidavits of Plaintiffs William Cunningham and Bruce Lowry that describe in chronological fashion the relevant events of March 18, 22, and 23, 1984, as they experienced them.

Because of logistical difficulties involved in consulting with clients at the Arizona State Prison, and in the interests of economy, affidavits from only two of the plaintiffs are included. However, counsel will

obtain additional plaintiffs' affidavits if the Court deems it necessary.

The Statement of Facts is divided into two sections: (1) Events of March 15, 1984; and (2) Events of March 22 and 23, 1984.

I. MARCH 15, 1984

1. Plaintiffs were incarcerated in Cell Block 6 (CB6) at the Arizona State Prison on March 15, 1984. (Defendants' Answer to Lowry Complaint, ¶6; Lowry Aff. ¶1; Cunningham Aff. ¶ 2).

2. On March 15, 1984, defendant correctional service officers (CSO's) forcibly removed approximately 13 to 16 inmates, including plaintiffs, from their cells in CB6 and escorted them to a hallway in Wing One. (Cordova Depo. 23, 24; Perry Depo. 25).

3. Inmates were handcuffed behind the back. Additional restraints included leg shackles and belly chains. (Rieffer Depo. 12, 13).

4. The hallway in Wing One has a counselor's office on one side. There is a window in the counselor's office that looks onto the hallway, and there are windows approximately six inches by three feet in the doors leading out of the hallway. (Teeples Depo. 18, 19). The walls of the hallway contain heavy glass to enable one to see into the pods. (Perry Depo. 24).

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5. The hallway was not scrubbed down or sterilized in preparation for the searches. (LaRue Depo. 32; Whittington Depo. 49).

6. A folding conference-type table, approximately three feet wide and five feet long, was placed in the hallway. There was no cover on the table for the searches. (Perry Depo. 24-26; Lowry Aff. ¶4).

7. As each inmate was brought to the table in the hallway, he was told that he was going to be given a rectal exam. Guards then took the inmate's pants down and had him bend over or forcibly bent him over the table. (Teeples Depo. 30,31; Perry Depo. 19).

8. If the inmate verbally objected to the search or resisted in any manner, the inmate was forcibly bent over the table and the search was conducted without his cooperation. (Beaty Depo. 14). Even if the inmate did bend over the table, he was then restrained by the guards. (Gardea Depo. 27; Beaty Depo. 25).

9. During each search there were usually four guards holding the inmate. (Gardea Depo. 27,28). The guards forced the inmates down by pressing on their shoulders. (Teeples Dep. 30, 31). If an inmate resisted, it could cause a tightening of the anal sphincter, which would make penetration difficult if not impossible. (Perry Depo. 37).

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10. Defendant CMA's performed digital rectal cavity searches on each of the inmates. In conducting a rectal cavity search, the CMA put a glove on his right hand, applied KY gel to a finger, and then inserted the finger into the inmate's rectum. (Perry Depo. 26).

11. Upon completing a search, the CMA would remove the glove with the ungloved hand. The CMA would then use the free hand to place another glove on the hand to be used in the next cavity search. (Teeples Depo. 32; Perry Depo. 53). The CMA's did not wash their hands following the removal of the used glove or at any other time between the searches. (Whittington Depo. 43,44; Beaty Depo. 27).

12. The only medical supplies in the hallway area were a box of gloves and a tube of KY gel. There was no wash basin or any type of facility in the hallway for CMA's to wash their hands. (Perry Depo. 25; Teeples Depo. 24).

13. Following the search, the guards pulled up the inmates' pants but did not give the inmates any opportunity to clean themselves. (Nabor Depo. 37; Lowry Aff. ¶ 10).

14. The rectal searches were conducted in full view of up to 8 or 9 correctional officers. (Nabor Depo. 46). At least one person from Intelligence & Investigations videotaped the search procedure.

Tempe, AZ 85287
(602) 965 6968

(Rieffer Depo. 26; Dickey Depo. 23). Other inmates also observed some of the searches being conducted. (Rieffer Depo. 27).

15. Inmates did not give their consent for the searches. (Cunningham Aff. ¶ 10; Lowry Aff. ¶ 6,12). A rectal exam is considered a medical procedure which an inmate should have the opportunity to refuse. (DeCarvalho Depo. 156).

16. No alternatives to the rectal searches were offered to any of the inmates. (Beaty Depo. 14, 15). Inmates were not given an opportunity to voluntarily pass any suspected contraband. (Rieffer Depo. 13; Perry Depo. 52).

17. The CMA's performed no visual searches of the inmates' rectal cavities. The inmates' mouths and noses were not searched. (Lowry Aff. ¶ 9; Cunningham Aff. ¶ 4).

18. Guards were laughing and joking while the inmates were being subjected to the rectal cavity searches. (Teeples Depo. 27; Cunningham Aff. ¶ 5; Lowry Aff. ¶ 22).

19. Defendants made no attempt to examine inmates' medical records prior to conducting the rectal cavity searches to see if the exam would possibly aggravate a pre-existing condition of any inmate. (Perry Depo. 38; Teeples Depo. 38). Inmates were not asked whether they

Arizona State University
Tempe, AZ 85287
(602) 965 6968

had any history of medical problems that might be aggravated by the search. (Teeples Depo. 38; Lowry Aff. ¶ 7). It is possible that a rectal exam would aggravate a pre-existing condition such as a hemorrhoid or rectal fistula. (Perry Depo. 38; DeCarvalho Depo. 150).

20. None of the prison personnel, including medical personnel, had ever received any training or instruction regarding how to perform a rectal cavity search on inmates who were resisting the search. (Whittington Depo. 37; DeCarvalho Depo. 108; Perry Depo. 37). The searches conducted on March 15, 1984, were the first rectal searches of any sort that some of the CMA's had ever performed. (Beaty Depo. 12).

21. No training film was ever shown on how to conduct inmate searches. (Beaty Depo. 24). The prison doctor did not train or instruct the CMA's or Physician's Assistants on how to properly perform a digital rectal examination. (DeCarvalho Depo. 46).

22. In one CMA's opinion, the setting in which the rectal search took place was not an appropriate medical setting and it was not medically sound to perform the rectal searches without washing hands between each search. (Whittington Depo. 49, 50).

23. In the opinion of a defendant prison doctor, the paper on the examination table should have been

Arizona State University
Tempe, AZ 85287
(602) 965 6908

changed between inmate searches in order for the procedures to be medically appropriate. (DeCarvalho Depo. 147).

24. In the opinion of a CMA and a prison doctor, performing a rectal exam on an unwilling, struggling inmate is detrimental. The long term effect could be injury or an increased chance of rectal problems in the future. (Perry Depo. 37).

25. In the opinion of a defendant prison doctor, it was unnecessary to perform rectal searches in the hallway when there were examining rooms available, and it was not appropriate for other prison employees or inmates to be present during the performance of rectal searches. (DeCarvahlo Depo. 145, 146). The searches were not conducted in private and therefore violated a provision of DOC Policy #405. (Beaty Depo. 20).

26. Authorization for the rectal searches came from Defendant Ted Jolley. Mr. Jolley did not say where his orders came from or explain why the searches were to be done. No written instructions were given. (Teeples Depo. 35, 36; Beaty Depo. 13).

27. On March 15, 1984, several of the inmates who had been subjected to rectal cavity searches in CB6, including plaintiffs, subsequently were taken to the Central Health Unit at the ASP (Contreras Depo. 23, 24; Anderson Depo. 18; DeCarvalho Depo. 109), where all of

Arizona State University
Tempe, AZ 85287
(602) 965 6968

them except Plaintiff Palmer were subjected to further digital rectal cavity searches by Defendant DeCarvalho. (DeCarvalho Depo. 109, 110).

28. While at the CHU, the inmates were handcuffed behind the back; additional restraints included leg shackles and belly chains. (Contreras Depo. 27; DeCarvalho Depo. 61; Morrow Depo. 13, 19).

29. Defendant DeCarvalho knew that the inmates he was searching at the CHU already had been subjected to digital rectal cavity searches in CB6 earlier that day. (DeCarvalho Depo. 110).

30. None of the defendants involved in the searches at the CHU tried to determine from the inmates or their medical records whether they had any medical conditions that would make digital rectal cavity searches inappropriate. (DeCarvalho Depo. 157; Stapler Depo. 60, 61).

31. None of the inmates were asked if they consented to the rectal cavity searches at the CHU (DeCarvalho Depo. 111, 157; Stapler Depo. 85), and none of the defendants involved in the searches offered the inmates any alternatives. (Contreras Depo. 42-43; Stapler Depo. 43, 44, 45; Cunningham Aff. ¶ 24).

32. The inmates also were X-rayed at the CHU. (Contreras Depo. 24; Anderson Depo. 31; DeCarvalho Depo. 109, 110). The X-rays were taken by defendants

Arizona State University
Tempe, AZ 85287
(602) 965 6968

DeCarvalho and Contreras, neither of whom was a licensed X-ray technician. (DeCarvalho Depo. 73, 113, 114; Contreras Depo. 24, 26).

33. The inmates were not asked if they consented to X-rays. (Contreras Depo. 43; DeCarvalho Depo. 114). In Defendant DeCarvalho's opinion, it is not medically appropriate to perform X-rays on individuals without their consent. (DeCarvalho Depo. 114).

34. In addition to the digital rectal cavity searches and X-rays, Plaintiff Palmer was subjected to a painful rectal probe by a female prison doctor, Defendant Stapler. (DeCarvalho Depo. 78, 85; Contreras Depo. 34, 35). Plaintiff Palmer was not asked to consent to this procedure (Stapler Depo. 85; DeCarvalho Depo. 81), and was not offered any alternatives. (Stapler Depo. 43, 44, 45).

35. Defendant Stapler first performed a digital rectal search on Plaintiff Palmer; then inserted a sigmoidoscope into his rectum; then searched him digitally again; and then inserted a "clamp" and two fingers into his rectum. (Stapler Depo. 47-50, 54). Plaintiff Palmer resisted this procedure and was physically restrained by four CSO's. (Cordova Depo. 29, 30; Stapler Depo. 41, 42; DeCarvalho Depo. 80).

36. In Defendant DeCarvalho's opinion, the use of a clamp on an inmate who is struggling is not medically

Arizona State University
Tempe, AZ 85287
(602) 965 6968

appropriate, and it would be more appropriate to place the inmate in an isolation cell. (DeCarvalho Depo. 86-88, 107).

37. Defendant Stapler did not review Plaintiff Palmer's medical history prior to the probe procedure. (Stapler Depo. 60, 61). Although Defendant Stapler noticed bleeding in Plaintiff Palmer's rectum during the probe, she did not provide or arrange any follow-up treatment. (Stapler Depo. 60, 63, 64).

38. At the CHU, at least one plaintiff, Lowry, was first X-rayed without his consent. When that X-ray failed to show anything, a non-medical ASP employee insisted that a second X-ray be taken. After Plaintiff Lowry unsuccessfully attempted to defecate, he was subjected to a further digital rectal cavity search, without his consent. This search procedure was visible to female personnel walking by the examining room. (Lowry Aff. ¶¶ 12-17).

39. Another plaintiff, Cunningham, was first subjected to a further digital rectal cavity search at the CHU, without his consent and without any alternatives being offered. Plaintiff Cunningham then was X-rayed without his consent, and was told to defecate. After he defecated, he was subjected to yet another digital rectal cavity search. At various times during these procedures, ASP personnel made insulting

Arizona State University
Tempe, AZ 85287
(602) 965 6968

remarks regarding Plaintiff Cunningham. (Cunningham Aff. ¶¶ 20-35).

40. Following the searches at the CMU on March 15, 1984, at least some inmates were isolated in special cells, or in their regular cells, without any of their property or any contact with other persons other than ASP personnel. These inmates remained in isolation at least until March 22, 1984. (Cunningham Aff. ¶ 36; Grijalva Depo. 43, 77; Wawrzaszek Depo. 33).

41. On March 15, 1984, contact visits for CB6 inmates were discontinued. (Wawrzaszek Depo. 88).

II. MARCH 22 and 23, 1984

42. On March 22 and 23, 1984, defendants performed digital rectal cavity searches on approximately 160 inmates, including plaintiffs, housed in CB-6. (LaRue Depo. 34; Whittington Depo. 19-20).

43. Defendants conducted digital rectal cavity searches on tables set up in hallways in CB-6. (Anderson Depo. 13; LaRue Depo. 12, 14).

44. Inmates were physically restrained with handcuffs and leg irons before and during the digital rectal cavity searches. (Anderson Depo. 22; Dickey Depo. 37; LaRue Depo. 11, 22).

45. The CMA's performing the digital rectal cavity

Arizona State University
Tempe, AZ 85287
(602) 965 6968

searches did not search other body cavities for contraband. (LaRue Depo. 23; Perry Depo. 43).

46. None of the ASP personnel involved in the searches offered the inmater any alternatives to the digital rectal cavity searches. (LaRue Depo. 18; Perry Depo. 52).

47. The rectal cavity searches were "mandatory" for each inmate. (LaRue Depo. 11; Savinen Depo. 29).

48. If an inmate resisted the digital rectal cavity search, he was physically forced to submit to the search. (Anderson Depo. 25; Dickey Depo. 17, 18). Some inmates were physically held down by ASP personnel during the digital rectal cavity searches even though they did not resist. (LaRue Depo. 17, 22, 46; Perry Depo. 19).

49. The digital rectal cavity searches were conducted in full view of a number of ASP personnel and other inmates. (Acuna Depo. 27; Anderson Depo. 20; Savinen Depo. 37, 53).

50. Portions of the digital rectal cavity searches were videotaped by an ASP employee. (Acuna Depo. 21; LaRue Depo. 21, 22).

51. The halls in which the digital rectal cavity searches were performed were not cleaned in any way before or during the searches (LaRue Depo. 32; Perry Depo. 26), and the searches therefore were not conducted

Arizona State University
Tempe, AZ 85287
(602) 965 6968

according to standard medical procedure. (Whittington Depo. 49).

52. The tables on which the digital rectal cavity searches were performed were not cleaned or covered by sanitary paper before or during the searches. (LaRue Depo. 15, 32; Lowry Aff. ¶ 20).

53. The CMA's who performed the searches touched the bodies of the inmates with their ungloved hands (Cunningham Aff. ¶ 40), and the searches therefore were not conducted according to standard medical procedure. (Whittington Depo. 45).

54. The CMA's who performed the searches in the halls put on and removed the glove used ~~in~~ each search with their free hand. (LaRue Depo. 24, 25; Perry Depo. 53).

55. The CMA's who performed the searches in the halls did not wash their hands between searches (LaRue Depo. 25; Savinen Depo. 41), and the searches therefore were not performed in a medically sound manner (Whittington Depo. 44, 49, 50).

56. The CMA's who performed the searches were not trained or experienced in performing involuntary digital rectal cavity searches. (LaRue Depo. 37, 39; Perry Depo. 33, 36; Whittington Depo. 37).

Arizona State University
Tempe, AZ 85287
(602) 965 6968

57. None of the ASP personnel involved in the searches tried to determine from the inmates or their medical records whether they had any medical conditions that would make digital rectal cavity searches medically inappropriate. (LaRue Depo. 32; Perry Depo. 38).

58. The inmates were not allowed to clean themselves after the searches. (LaRue Depo. 31; Whittington Depo. 45, 46).

59. The inmates who were searched on March 22 and 23, 1984, included inmates who had been searched repeatedly on March 15, 1984, and then isolated. (Cunningham Aff.; Lowry Aff.).

60. The defendants had not conducted any digital rectal cavity searches for security purposes at the Arizona State Prison prior to March 15, 1984. (Grivalja Depo. 84; Wawrzaszek Depo. 20). The defendants have conducted no digital rectal cavity searches for security purposes at the Arizona State Prison since April of

Arizona State University
Tempe, AZ 85287
(602) 965 6968

1984. (Wawrzaszek Depo. 20).

RESPECTFULLY SUBMITTED this 18th day of February, 1987.

A.S.U. LAW SCHOOL CLINIC

/s/
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Lead Counsel for Plaintiffs

/s/
Lawrence B. Weeks
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Cunningham and Lowry

/s/
Ronna Hodges
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/s/
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Student Attorney

/s/
Cindra White
Student Attorney

Copies of the foregoing
mailed this 18th day of
February, 1987, to:

Ronald Greenhalgh, Counsel for Defendants
Alice Bendheim, Lead Counsel for Plaintiffs
Michael Kimerer, Lead Counsel for Plaintiffs

By: /s/

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Tempe, AZ 85287
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EXHIBIT "C"

APPROVED:

DIRECTOR

EFFECTIVE: 3/22/82

SUBJECT:

INMATE SEARCHES
(Supercedes Policy #405 dated 7/23/80)

Revised

PURPOSE:

To provide policy and procedure to ensure the control of weapons and contraband in the various institutions by effective searches of facilities and inmates.

AUTHORITY:

A.R.S. 31-230 - Taking Prohibited Articles into Prison - Penalty
A.R.S. 41-1604 - Duties and Powers of the Director

POLICY:

It is the policy of the Department of Corrections that there is a comprehensive plan for searches that will inhibit inmate traffic in contraband, and that there is a staff training program in effective search techniques that protect both staff and inmates from bodily harm.

PROCEDURE:

1. Criteria for Conducting Searches:

   a. Each shakedown and/or search of facilities and/or inmates must be specifically authorized by the Chief Executive Officer or designee except where routine searches are a part of a published and approved standard operating procedure.

   b. Searches will be frequent, unannounced, and irregularly timed and will require a minimum of two officers present during the search. Inmates will be present during a search of their living area unless institutional security dictates otherwise, in which case documentation is required.

   c. Searches conducted at a Community Treatment Center must be carried out by two staff members unless authorization has been received from the C.T.C. Supervisor or the Assistant Director of Adult Community Services for one officer to conduct the search.

   d. Searches should be conducted no more frequently than necessary to control contraband and recover missing property.

   e. Searches will be conducted in such a manner to avoid unnecessary force or indignity to the inmate and to respect the right of the inmate to any property authorized by institutional regulations.

PROCEDURE:

1. Criteria for Conducting Searches: (Cont'd)

   f. The Chief Security Officer on duty will authorize an immediate search only when circumstances justify conducting a search prior to obtaining the Chief Executive Officer's permission. When an immediate search is conducted, the Chief Executive Officer will be notified as soon as possible after the search.

   g. Procedures shall provide for appropriate use of sensors and mechanical devices, the appropriate search of all vehicular traffic into the institution and the search and supervision of trustees.

   h. Each Chief Executive Officer shall publish, for staff and inmates, approved inmate personal items.

2. Body Cavity Searches:

   a. Body cavity searches may be authorized only when there is probable cause to believe that the person to be searched is in the possession of contraband. The determination of probable cause, and the authorization to conduct a body cavity search, will be made by the Chief Executive Officer or designee.

   b. Great discretion is required in the authorization of a body cavity search. In the event this is authorized, it will be conducted by health care personnel or correctional personnel trained by health care personnel.

   c. Staff will conduct routine visual inspections of body cavities as an approved method to control contraband. This inspection will be conducted in private by trained personnel.

   d. Body cavity searches and visual inspections will be conducted by staff of the same gender as the inmate.

3. Inmate Notification:

   a. This policy will be posted in all institutional living areas.

   b. A copy of this policy will be kept on file in every DOC policy manual and made available to inmates upon request.

IMPLEMENTATION:

This policy will be implemented on effective date.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ___ day of December, 1987, he mailed one copy of the foregoing document, with first-class postage pre-paid, to:

Ronald Greenhalgh, Esq.
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

ROBERT BARTELS

Certificate of Service

The undersigned hereby certifies that on the 13th day of March, 1969, he mailed one copy of the foregoing document, with first-class postage pre-paid, to counsel for the petitioners:

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Assistant Attorney General
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Robert Bartels
Counsel for Respondents